(1)

91-630

No. _____

In The

Supreme Court of the United States

October Term, 1991

BRUCE J. RICE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

RICE AIRCRAFT, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ALAN ZARKY*
DAN R. DUBITZKY
DAN R. DUBITZKY, P.S.
1011 Western Avenue
Suite 803
Seattle, WA 98104
(206) 467-6709

MICHAEL P. RUARK
INSLEE, BEST, DOEZIE & RYDER, P.S.
2340 130th Ave. N.E.
Building D
P.O. Box C-90016
Bellevue, Washington 98009-9016
(206) 455-1234

*Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I.

In pleading guilty, Bruce Rice was specifically advised as part of the Rule 11 colloquy that the maximum sentence he faced was five years imprisonment. The court imposed a sentence in excess of this maximum: Rice was sentenced to serve four years immediately with an additional ten years of imprisonment imposable in the event Rice violated his probation.

A. Did the district court violate Rule 11(c)(1), Fed. R. Crim. P., which requires that a defendant be advised of the maximum possible sentence he faces?

B. When the district court fails to inform a defendant of the maximum possible sentence, in violation of Rule 11(c)(1), can the appellate court salvage the guilty plea by relying on its own interpretation of the terms of a written plea agreement, absent any evidence of whether or how the defendant understood the agreement's terms?

C. What is the standard for determining harmless error under Rule 11(h): demonstration that the error was harmless by proof beyond a reasonable doubt, by a preponderance of the evidence, or by clear and convincing evidence?

D. When a defendant received a sentence more severe than that he was advised of prior to entering his guilty plea, what is the appropriate remedy: vacating of the guilty plea, with the opportunity to plead anew, or modifying of the sentence to conform to the incorrect advisement given at the plea proceedings?

QUESTIONS PRESENTED FOR REVIEW – Continued

II.

A. Should the courts require "strict" or "substantial" compliance with Rule 32(c)(3)(D)'s requirement that the sentencing court resolve any disputed matter in the presentence report upon which it intends to rely at sentencing?

B. May a district court comply with Rule 32(c)(3)(D) by making general findings, purporting to address all disputed matters in a single comment, or must it make specific findings on each disputed matter?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

OPINION IN THE APPELLATE COURT

The United States Court of Appeals for the Ninth Circuit filed its opinion on July 8, 1991. A copy is attached as Appendix A. The decision became final on September 10, 1991, when the Court of Appeals denied Bruce Rice and Rice Aircraft, Inc.'s timely-filed Petition for Rehearing and Suggestion for Rehearing En Banc. A copy of the Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is attached as Appendix B.

JURISDICTION OF THIS COURT

This Court has jurisdiction over this case under 28 U.S.C. § 1254(1) to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit. Petitioners respectfully pray that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES OF CRIMINAL PROCEDURE WHICH THIS CASE INVOLVES

Federal Rule of Criminal Procedure 11(c):

> **Advice to Defendant**. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty

provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense . . .

Federal Rule of Criminal Procedure 32(c)(3)(D):

If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

Bruce Rice and Rice Aircraft, Inc.[1] were charged by information with violations of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 371 (conspiracy to defraud the

[1] We will refer to the individual, Bruce Rice, as "Rice" and Rice Aircraft, Inc. as "Rice Aircraft." Rice Aircraft, Inc. has no parent companies and no subsidiaries other than wholly-owned subsidiaries.

United States and to commit mail fraud, wire fraud, and Travel Act violations). Both defendants entered into plea agreements with the government pursuant to Fed. R. Crim. P. 11(e)(1)(C) and entered pleas of guilty. Rice received a sentence of four years imprisonment on Count 1, and suspended sentences of up to ten years on Counts 2 and 3. Conditions of the suspended sentence included a fine of $750,000 and restitution of up to $1,000,000, with the restitution to be imposed jointly and severally with Rice Aircraft. Rice Aircraft was fined $50,000.

The district court denied Rice's motion for bail on appeal. The Court of Appeals, however, granted bail, finding that a "substantial" question was presented, as that term is used in 18 U.S.C. § 3143(b)(1)(B).

FACTUAL BACKGROUND

The Plea Proceedings

At the time of entry of plea, the district court undertook a Rule 11 colloquy, during which the following discussion occurred:

THE COURT: I accept the plea agreement subject to my review of the presentence report. I'll ask the U.S. Attorney, Mr. Carter, to now describe what the sentence could be in this case should the plea be accepted.

MR. CARTER: Your Honor, if the plea is accepted, then *the sentence in this case could amount to five years' incarceration,*

and [various fines and restitution].

THE COURT: Well, Mr. Rice, let me be sure that you understand what the possibilities are should I accept your plea, sir. First, do you understand that under the plea agreement, I could sentence you to up to five years in jail on Count I of the Information?

THE DEFENDANT: I do, Your Honor.

. . .

THE COURT: And the plea agreement, if accepted by the Court, would involve probation on Counts II and III. Is that your understanding?

THE DEFENDANT: Yes, sir.

[8/16/89 RT 12-13] (emphasis added).

Neither the court nor the prosecutor informed Rice that, in addition to five years of immediate imprisonment, Rice could receive up to ten years suspended imprisonment. Although the court did inform Rice that his sentence on Counts 2 and 3 would be "probationary," it gave no advisements concerning the length of the sentence that might be suspended and later imposed.

The court determined that Rice had reviewed the plea agreement, discussed it with counsel, and signed it. The court did not, however, inquire into Rice's understanding of how long any suspended imprisonment could be under the plea agreement. In fact, the court did not determine whether Rice understood the plea agreement at all. (The text of the plea agreement is set forth in Appendix E.)

The plea agreement recited the statutory maximum of five years per count. As a Rule 11(e)(1)(C) agreement, however, the document made clear that, if accepted by the district court, the actual sentence would be below the statutory maximum, and limited by the agreement. The document did not state the maximum sentence that might be suspended and later imposed, should probation be violated.

Rice was sentenced to four years imprisonment on Count 1, and received suspended sentences with a three year term of probation on Counts 2 and 3. The conditions of probation include payment of $750,000 in fines and up to $1,000,000 in restitution. In the event Rice violates any condition of probation, he faces up to ten additional years imprisonment.

The Sentencing Proceedings

The Disputes Presented At Sentencing

By way of a lengthy Information and even longer "Government's Proffer of Evidence," the government detailed its version of events. Rice and Rice Aircraft each filed a separate and very brief "Admissions Upon Plea of Guilty." Each admitted to facts involving certain narrow and discrete instances of misconduct, which the court found sufficient to constitute violations of the statutes charged. However, the defendants disputed the vast majority of the government's allegations regarding the scope and nature of the crimes charged.

Rice and Rice Aircraft had pled guilty to three types of conduct: A) replating aerospace fasteners without disclosing the fact of replating; B) submitting manufacturer's test reports to certain customers, falsely

representing that the reports pertained to particular fasteners; and C) making undisclosed payments to employees of various suppliers.

The government and Rice vigorously disputed the import of this conduct. For example, Rice contended that the payments had been extorted from him, and were made simply to obtain for Rice Aircraft the parts and services to which it was entitled. Secondly, while there was no claim that the replating had actually caused a safety problem, the parties differed sharply on whether the replating had posed even the *potential* for a safety problem. Finally, the parties contested the implications of submitting inapplicable test reports. The government claimed that Rice had fraudulently deprived his customers of important information. Defendants asserted that they had committed at most a technical fraud, because the parts they supplied had been fully tested, with the results memorialized in a different report, currently unavailable, than that submitted to customers.

The presentence investigation report ("PSI") discussed all of these various disputes. It presented both versions of events, the government's and the defendants'.

Because of the disparity between the government's allegations and the defendants' admissions, both sides filed extensive pleadings to support their respective version of events.

The Court's Findings and Lack of Findings

At several points throughout the sentencing proceeding, the court conceded that it would not be making findings on all the disputed issues. The court remarked, "It is not going to be possible for me to make detailed

findings with respect to all of the technical issues that have been raised." [3/9/90 RT 82-83]

As the court explained, these issues were simply too complex to resolve without lengthy testimony.

> I might note, however, that there are some substantial differences of opinion and issues which have been raised between the government and its proffer and the defendants and the matters they have presented to me in the course of the sentencing procedure. *It's unfortunate in a way that* a complete airing of all these procedures and the witnesses couldn't come into open court and testify and *there couldn't be a final resolution, if you will, of all of the issues* and of all of the practices in the industry. But that is not to be in connection with this case. [3/9/90 RT 82] (emphasis added)

The court later confirmed that it was not resolving one particular area of dispute, again referring to the massive effort that would be necessary to make all the required findings. The court stated:

> There is certainly a dispute in the industry as to whether and to what extent these test reports were relied upon by the customers. And the Court, I'm sure, would have weeks of testimony and trial to resolve those issues. [3/9/90 RT 87]

In the findings the court did make, the court addressed certain of the specific disputes defendants had with the PSI. However, the court did not purport to address specifically all of the disputes.

In addition, the court made a general statement, which the Court of Appeals characterized as a finding on all issues, despite the district court's concessions at other points that it was *not* making a finding on all disputed matters.

> I have reviewed the presentence reports and believe that they accurately provide an objective evaluation of the facts in the case. I am therefore going to find as facts for purposes of sentencing the facts contained in the presentence report, subject to some additional findings I'm going to make during the course of my remarks. [3/9/90 RT 81-82]

As mentioned, the PSI had set forth both the government's and defendants' contrary versions of various disputes. The court did not explain which version of "the facts contained in the presentence report" it was finding to be true.

The defendants had not itemized their disputes with the PSI, but had presented them as part of their broad attack on the government's allegations. On defendants' appeal, the government contended that this failure to itemize constituted a failure to trigger the requirements of Rule 32(c)(3)(D). The Ninth Circuit expressed concern that defendants had not itemized their objections, but still rejected the government's position, noting that the district court had accepted defendants' approach to disputing matters in the PSI and that the district court had "rebuffed the government's request that the defendants specify their objections more clearly." (Appendix A, App. 9)

JURISDICTIONAL BASIS IN THE COURT BELOW

The district court had jurisdiction over this case under 18 U.S.C. § 3231 because defendants were charged with violating federal criminal statutes. The Judgments of the District Court were entered on March 26, 1990 and March 27, 1990 as to Rice and Rice Aircraft respectively.

Petitioners' Notices of Appeal were timely filed on March 26, 1990 and March 27, 1990. The Court of Appeals had jurisdiction over the appeal under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT VIOLATED RULE 11 BY ADVISING RICE THAT HE FACED A MAXIMUM OF FIVE YEARS BUT IMPOSING A SENTENCE OF UP TO FOURTEEN YEARS IMPRISONMENT; CERTIORARI SHOULD BE GRANTED TO RESOLVE SEVERAL CONFLICTS IN THE CIRCUITS REGARDING THE APPLICATION OF RULE 11

Certiorari should be granted in this case to address the rule most often implicated in criminal cases: the requirements of Fed. R. Crim. P. 11 that the court provide certain advisements to a defendant prior to a plea of guilty. There are fundamental conflicts in the courts of appeals regarding Rule 11, justifying certiorari under Supreme Court Rule 10.1(a). These conflicts relate to the factual pattern presented in this case – where there has been a failure by the district court to advise a defendant of the maximum sentence, and the government asserts that the error is harmless. First, the circuits disagree as to whether the appellate courts may look to a document not discussed during the Rule 11 colloquy, where there is no evidence that the defendant understood that document. The circuits disagree as well on the standard of proof applied to a claim of harmless error under Rule 11. Finally, there is a split in the circuits regarding the appropriate remedy for a Rule 11 violation.

Certiorari should be granted, not just to resolve the conflicts in the circuits mentioned above, but to address important issues pertaining to the advisement requirements of Rule 11. This Court last analyzed Rule 11 over twenty years ago, in *McCarthy v. United States*, 394 U.S. 459 (1969). Since then, the Rule has been amended to include a harmless error provision, Rule 11(h), and to specify far greater detail regarding the necessary advisements. In literally hundreds of cases, the courts of appeals have grappled with what the Rule requires, when its violation should necessitate reversal, and what the remedy for a violation should be. This is not surprising, given that the overwhelming majority of criminal cases result in guilty pleas governed by Rule 11. The Court's review in this case will provide renewed guidance to the courts of appeals on how to resolve assertions of noncompliance with Rule 11.

In the present case, to Rice's significant prejudice, the district court did not comply with Rule 11(c)(1)'s mandate that the court "inform the defendant of, and determine that the defendant understands . . . the maximum possible penalty provided by law." The Assistant United States Attorney did provide an advisement, but it was totally incorrect. He specifically informed Rice that Rice faced a maximum of five years imprisonment, when in fact he faced a maximum of fifteen years, five immediately, and ten which might be imposed later. Rice actually received a sentence of fourteen of those years, four years immediately and ten years that may be imposed later. He thus may be imprisoned for nine more years than he was ever informed of.

A. The Panel Opinion's Analysis

The Ninth Circuit, while conceding that the district court did not advise Rice how long his suspended sentence might be, concluded that any error was harmless under Rule 11(h).[2] The Court of Appeals asserted that the plea agreement's language informed Rice that the prosecutor's statement was incorrect, and that the maximum sentence could include fifteen years imprisonment. In doing so, the court utilized an approach to Rule 11(h)'s harmless error provision that conflicts sharply with the intent of the Rule and with its application by several other circuits.

Specifically, the court concluded that the plea agreement, by stating the statutory maximum and by mentioning that part of the sentence would be probationary, necessarily advised Rice that he faced ten years imprisonment imposable at a later date. Although we submit that a fair reading of the plea agreement does not at all convey what the Court of Appeals read into it, the most that

---

[2] The Ninth Circuit explicitly declined to decide whether the court had to advise Rice of the potential for an additional ten years of incarceration, because it concluded that Rice had been so advised. The opinion therefore never actually resolved whether there was error under Rule 11. For the benefit of this Court, in deciding whether to grant certiorari, we contend that the answer should be clear. Here, Rice was informed that the maximum term he could possibly receive was five years, but his actual sentence involves four years immediately and up to ten more years later (should the suspended sentence ultimately be imposed). Under these circumstances, his actual sentence may be far in excess of the term he was advised of. This presents a clear violation of Rule 11's requirement that the court advise the defendant of "the maximum possible penalty provided by law."

could be said was that the document was ambiguous. Yet the Ninth Circuit affirmed, without any showing that Rice had understood the document to mean he faced fifteen years; the affirmance was in spite of the explicit advisement during the Rule 11 colloquy that Rice faced a maximum of five years.

B. The Harmless Error Provision of Rule 11

There can be no doubt that a Rule 11 error occurred; the district court did not personally advise Rice of the correct maximum sentence. Certainly, such an error *could* have been harmless. If, for example, the prosecutor had properly advised Rice of the maximum during the Rule 11 colloquy, the court's failure personally to undertake the colloquy would not have prejudiced Rice, although it would have been a technical violation of the Rule. *See, e.g., United States v. Kearney*, 750 F.2d 787 (9th Cir. 1984). But here, the prosecutor's advisement was completely incorrect. Alternatively, if Rice had been wrongly advised, but had received a sentence less than the incorrect advisement (for example, a sentence of two years currently, two years suspended), then again the error would have been harmless. Instead, the actual sentence was almost three times the term mentioned by the prosecutor.

The various circuits and the Advisory Committee notes concur that these are the two situations in which a Rule 11 error can be harmless. However, the Ninth Circuit went beyond these situations to a new form of "harmless error," where the court examines a document whose contents were not discussed during the Rule 11 colloquy, without any showing of what the defendant

understood the document to mean. Compare what occurred below to the Advisory Committee's example of harmless error, based upon a showing that the defendant understood his situation despite an incomplete advisement: "where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that some essential element of the crime was not mentioned, but *the defendant's responses clearly indicate his awareness* of that element." Reprinted in *Federal Criminal Code and Rules* at 56 (West, 1991 revised ed.) (emphasis added).

Here, Rice's response, demonstrating that he had read the plea agreement, does not indicate at all, let alone clearly, that he understood the length of the suspended sentence the court could impose. Since the defendant's correct understanding is the entire goal of Rule 11, the Ninth Circuit's new approach not only conflicts with other circuits, but violates the very essence of the Rule.

The Advisory Committee notes make clear that "Subdivision (h) makes *no change* in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal." Reprinted in *Federal Criminal Code and Rules* at 56 (emphasis in original). Here, we are not suggesting that reversal should automatically result from some inconsequential, technical non-compliance with the Rule. Rather, reversal should result because the Rule 11 advisement was prejudicially incorrect, and the only arguable evidence that Rice actually understood the maximum sentence is an extremely ambiguous document, with no evidence at all of how Rice interpreted that document.

C. The Conflict Among the Circuits As to What Evidence of a Defendant's Understanding May Suffice to Establish Harmless Error

By looking to the plea agreement to make up for deficiencies in the Rule 11 colloquy, the Ninth Circuit was squarely in conflict with several other circuits. In *United States v. Bernal*, 861 F.2d 434 (5th Cir. 1988), *cert. denied*, 110 S.Ct. 203 (1989), the court rejected the exact argument accepted below by the Ninth Circuit. The government contended in *Bernal* that a written plea agreement and statement of factual findings provided the advisements which the district court had not given. The court refused to accept this as a substitute for the judge-defendant colloquy required by Rule 11.

The Fifth Circuit had previously stated that matters outside the Rule 11 colloquy could be relied upon only if they created a "plenary and free from parsimony" demonstration of a defendant's understanding. *United States v. Coronado*, 554 F.2d 166, 173 (5th Cir.), *cert. denied*, 434 U.S. 870 (1977).[3] In Rice's case, where there is *no* demonstration of his understanding of the plea agreement, the Ninth Circuit's approach conflicts with both of these Fifth Circuit cases.

Other circuits have also declined to find harmless error absent a clear demonstration of the defendant's understanding *from his responses*, in accord with the Advisory Committee Notes. *See, e.g., United States v. Hourihan*, 936 F.2d 508, 510 n. 3 (11th Cir. 1991) (indictment cannot

---

[3] Although *Coronado* was decided prior to the enactment of Rule 11(h), the Fifth Circuit was already applying a harmless error standard identical to that promulgated by Rule 11(h). *United States v. Corbett*, 742 F.2d 173, 178 n. 14 (5th Cir. 1984).

be held to have informed defendant of mandatory minimum where "there is no indication in the record that the defendant was directed to the relevant portion of the indictment, or that she understood or had even read the relevant portion of the indictment"); *United States v. Daniels*, 821 F.2d 76, 80 (1st Cir. 1987) (reversing *discretionary* denial of motion to withdraw plea based upon Rule 11 violation; refusing to look beyond Rule 11 transcript for evidence of voluntariness of plea, in part out of a prophylactic consideration of encouraging a full record at Rule 11 hearings); *United States v. Goldberg*, 862 F.2d 101, 106 (6th Cir. 1988) (reversing *discretionary* denial of motion to withdraw plea based upon Rule 11 violation; factual basis not explicitly established on Rule 11 record; court rejected government's proposal that a "totality of circumstances" test should be used, including looking to defendant's education and conversations with counsel, to establish that defendant's answers provided factual basis for plea).

In another approach, the Fifth Circuit has held that whenever there is a total failure of the district court to discuss a "core concern" of Rule 11, the court will refuse to apply a harmless error analysis at all. *United States v. Pierce*, 893 F.2d 669, 679 (5th Cir. 1990).

Other circuits, however, have looked to virtually any suggestion of the defendant's understanding, far beyond his actual responses. *See, e.g., United States v. Young*, 927 F.2d 1060 (8th Cir. 1991) (failure of court to advise defendant of maximum and minimum sentence held harmless, where defendant had in front of him Indictment, stating in caption "NLT" and "NMT" the appropriate terms of imprisonment; no showing that defendant had read

indictment or understood its statement of potential sentences; opinion explicitly rejects Fifth Circuit's approach in *Pierce*); *United States v. Carey*, 884 F.2d 547 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1786 (1990) (failure to advise of supervised release deemed harmless after defendant didn't object at sentencing). Thus, the conflict in the circuits is clear, and involves most of the Courts of Appeals. The issue is ripe for Supreme Court review.

D. The Conflict Between the Panel Opinion and This Court's Pronouncements

Even absent the circuit conflict, certiorari is warranted under Supreme Court Rule 10.1(c). The Ninth Circuit decision conflicts with this Court's decision in *McCarthy* and with the Advisory Committee notes. In addition, how to apply Rule 11's harmless error provision is an important question of federal law which should be settled by this Court.

By relying on material outside the Rule 11 colloquy, without any affirmative showing that Rice understood this other material, the Ninth Circuit's decision flies in the face of authority from this Court, in addition to the conflicts with other circuits noted above. One of the major purposes of Rule 11 is to ensure an adequate record, so that courts need not speculate regarding a defendant's understanding. *McCarthy*, 394 U.S. at 467. In *McCarthy*, this Court described Rule 11's twin goals: assuring that a guilty plea is voluntary at the time of the plea and facilitating a determination of voluntariness in any post-conviction proceeding. This Court held that both these purposes are undermined in proportion to the degree a court "resorts to 'assumptions' not based upon [defendant's] recorded responses to [a court's] inquiries."

Id. Here, the Ninth Circuit relied totally upon assumptions about Rice's understanding of the plea agreement, without any of his responses reflecting an understanding that he faced a maximum of fifteen years imprisonment.

E. Flaws in the Panel Opinion's Approach

The Ninth Circuit's speculation as to Rice's understanding was particularly unwarranted here. The Ninth Circuit concluded that the plea agreement's reference to the statutory maximum made clear to Rice what suspended sentence he faced on the probationary counts. Yet, as the opinion concedes, when there is a Rule 11(e)(1)(C) plea agreement, "the 'maximum possible penalty provided by law' becomes that available under the plea agreement." Appendix A, App. 3. So the plea agreement's reference to the *statutory* maximum told Rice absolutely nothing about the critical question, namely the maximum *under the plea agreement*. Yet the plea agreement was completely silent about what suspended sentence Rice could receive under the agreement. Its perfunctory reference to the statutory maximum contains no hint that the maximum suspended sentence under the agreement was the same as the statutory maximum.

An equally plausible interpretation of that document, at least to a lay person, would be that the most Rice could receive was five years, but that if the court imposed less than that, the remainder could later be imposed should probation be violated. Since this interpretation is consistent with what the prosecutor said during the Rule 11 colloquy, the Ninth Circuit's assertion that Rice believed otherwise is not supported by the record, absent some showing of what Rice understood the document to mean.

In light of the specific advisement of a five year maximum, for Rice to receive up to fourteen years completely violates the requirement that a defendant be informed of the maximum sentence he faces.

The Ninth Circuit's approach creates a curious hybrid between direct appeals and habeas corpus actions. In a habeas petition, the defendant would be able to supplement the record with independent evidence that he did not understand the maximum sentence. But direct appeals are supposed to be limited to what can be demonstrated from the defendant's responses at the Rule 11 colloquy. In effect, what the Ninth Circuit has done in this direct appeal is supplement the Rule 11 colloquy with other evidence of the defendant's understanding, independent of his responses. However, the defendant has no opportunity on appeal to supplement that colloquy with evidence that he did not understand the maximum sentence.

F. The Conflict Among the Circuits As to the Standard to Apply under Rule 11(h)

The panel did not specify the standard it applied under Rule 11(h). In other words, if Rule 11 is not complied with, can harmless error be found if the defendant's understanding of the maximum sentence is established by a mere preponderance, or need there be a more clear showing? The circuits are split as to this aspect of Rule 11 as well. *Compare United States v. Kamer*, 781 F.2d 1380, 1386 (9th Cir.), *cert. denied*, 479 U.S. 819 (1986) (error where cannot "establish beyond doubt" that defendant voluntarily entered plea) *with United States v. Parra-Ibanez*, 936 F.2d 588, 597 n. 23 (1st Cir. 1991) (court failed

to inquire into effect of medications on defendant's mental state; case remanded to allow defendant to establish that his medicine had potential to interfere with his cognitive abilities; error to be deemed harmless if government establishes by *preponderance* that defendant's medical regime was other than that reported by him). *See United States v. Drummond*, 903 F.2d 1171, 1175 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 759 (1991) (failure to advise of appeal rights is harmless under Rule 52(a) if government establishes by clear and convincing evidence that defendant knew of appeal rights); *United States v. Young*, 927 F.2d at 1065 (McMillian, J. dissenting, noting conflict in circuits and suggesting beyond a reasonable doubt standard). This additional conflict in the circuits provides further basis for granting certiorari.

We submit that the beyond a reasonable doubt standard is applicable, if not in all Rule 11 cases, at least in Rice's situation. Here, the failure to advise Rice of the maximum sentence rendered his plea unknowing and involuntary. *Boykin v. Alabama*, 395 U.S. 238 (1969). As a result, Rice was denied his constitutional right to due process. *McCarthy*, 394 U.S. at 466. The error must therefore be judged under the constitutional harmless error standard. *Chapman v. California*, 386 U.S. 18 (1967). The error cannot be considered harmless in this case: the mere fact that Rice read the plea agreement does not establish beyond a reasonable doubt that Rice understood the maximum sentence, especially given the prosecutor's incorrect advisement.

G. The Conflict Among the Circuits As to the Appropriate Remedy

If this Court grants certiorari and concludes that the Rule 11 error was not harmless, it would then face an issue as to which there is additional conflict in the circuits, providing further justification for the grant of certiorari. Specifically, the prosecution contended on appeal that if remand were necessary, the appropriate remedy would be to conform the sentence to the advisement Rice received. Under the prosecution's view, Rice would be entitled to having his sentence reduced to include four years immediate imprisonment and one year (not ten) of suspended imprisonment, but would not be entitled to plead anew. Government's Brief on Appeal at 28, 30.[4] The courts of appeals are split on whether that is an appropriate remedy. *Compare, e.g., United States v. Sharon*, 812 F.2d 1233 (9th Cir. 1987) (explicitly rejecting government's suggestion that matter be remanded for resentencing in conformance with incorrect advisement, because "the unlawful plea cannot stand.") *with, e.g., United States v. Khan*, 869 F.2d 661 (2d Cir. 1989), *cert. denied*, 111 S.Ct. 682 (1991) (where no advisement was given regarding potential for restitution, conviction upheld but matter remanded to strike restitution; original opinion had remanded for pleading anew); *United States v. Corn*, 836 F.2d 889, 895 (5th Cir. 1988) (giving district court option to strike portion of sentence not explained at time of plea).

---

[4] Because the Ninth Circuit found any error to be harmless, it did not address what the appropriate remedy would be for a reversible error.

In sum, Bruce Rice pleaded guilty, seriously misinformed about the maximum sentence he faced, such that he now faces nine years more than he realized. Certiorari should be granted to remedy this serious violation of Rule 11 and to resolve three significant conflicts in the circuits regarding application of Rule 11's harmless error provision.

II. THE DISTRICT COURT CREATED A HOPELESSLY AMBIGUOUS SENTENCING RECORD, IN VIOLATION OF RULE 32(c)(3)(D); CERTIORARI SHOULD BE GRANTED TO RESOLVE SEVERAL CONFLICTS IN THE CIRCUITS REGARDING APPLICATION OF THE RULE

Rule 32(c)(3)(D) requires that, when a defendant alleges inaccuracies in the PSI, the court must either make a finding on each controverted matter or make a determination that the matter will not be considered at sentencing. Certiorari is warranted because in this particular case the Rule has been misapplied in a manner fundamentally unfair to Rice.[5] It is warranted as well because of conflicts in the circuits regarding several different aspects of the Rule's application. In particular, the circuits differ sharply on how strictly the Rule must be complied with before non-compliance warrants a remand. In addition, the circuits are in conflict over the use of findings

---

[5] As a corporate entity, Rice Aircraft will not be subject to the same sorts of disabilities as Bruce Rice, such as denial of privileges by the Bureau of Prisons because the ambiguous sentencing record is misinterpreted. Nevertheless, the court's failure to make proper findings renders the sentencing proceeding inadequate as to Rice Aircraft and requires resentencing.

that address sentencing disputes generically, rather than specifically. Given the significant implications of the Rule in nearly every criminal case, and given that this Court has never addressed the requirements of Rule 32(c)(3)(D), these conflicts create a pressing need for Supreme Court review.

A. The Importance of Rule 32(c)(3)(D) and the District Court's Failure to Comply With the Rule

Insistence on compliance with the Rule is not a mere exercise in formality. The courts of appeals have recognized the significant implications that the presentence report, and the record of the court's interpretation of it, will have for a defendant, both at sentencing and later:

> The presentence report becomes "the central document in the correctional process." For example, the report may have an important influence on a defendant's classification in a prison, his ability to obtain furloughs, the treatment programs provided to him, and his parole determinations. Thus, transmission of an accurate presentence report, which includes a written record of the sentencing judge's resolution of contested matters in the report, is vitally important to the post-sentencing lives of criminal defendants.

United States v. Gattas, 862 F.2d 1432, 1434 (10th Cir. 1988) (citations omitted).

The Advisory Committee on Rules similarly refers to the "critical determinations" which may be affected by the presentence report. And in *United States v. Kerr*, 876 F.2d 1440 (9th Cir. 1989), the court stated, "Because of the manifest unfairness to a defendant if false or unreliable information is relied upon by the sentencing court, the

Bureau of Prisons, or the Parole Commission, strict compliance with [Rule 32(c)(3)(D)] is required." 876 F.2d at 1440.

It is undisputed that the district court below did not make a determination of non-reliance. It was thus obligated to make a finding on each disputed matter. However, the court utterly failed to do so. The district court was faced with a highly complex sentencing dispute,[6] in which the parties debated virtually every aspect of how the aerospace industry operates. The court announced at several points that it could not resolve many of these disputes without a lengthy evidentiary hearing (which hearing was never held). For example, the court observed, "It is not going to be possible for me to make detailed findings with respect to all of the technical issues that have been raised." Other, similar comments by the court are repeated verbatim in the Statement of Facts, p. 7 *supra*. These concessions by the court establish that it did not make findings on all the disputed matters.

The court made one general statement, which the Ninth Circuit treated as an all-encompassing fact-finding:

> I have reviewed the presentence reports and believe that they accurately provide an objective evaluation of the facts in the case. I am therefore going to find as facts for purposes of sentencing

---

[6] The complexities underlying the disputes at sentencing do not mean that resolution of this case is highly fact-specific, such as to make a grant of certiorari less warranted. To resolve this case, this Court need not address the factual disputes about Rice's activities or the nature of the aerospace industry. The only question presented by this portion of the petition is whether the district court made adequate findings as required by Rule 32(c)(3)(D), not whether any findings it did make were correct.

> the facts contained in the presentence report, subject to some additional findings I'm going to make during the course of my remarks. [3/9/90 RT 81-82]

As established *infra*, several circuits have held that such a broad comment cannot satisfy the Rule's requirement of explicit and unambiguous findings on each disputed matter. Other circuits, like the Ninth Circuit decision below, have concluded that this type of "finding" satisfies the Rule. There is a clear conflict in the circuits on this issue.

Even if such general statements were ever acceptable, the "findings" by the district court did not comply with the Rule, especially under the "strict compliance" standard followed by several circuits. In this case, the PSI had set forth both versions of the facts, versions which completely contradicted each other. As just one example, the report included the defendants' contention that all replating followed the manufacturer's specified procedures and the government's claim to the contrary. When the district court purported to "find as facts for purposes of sentencing the facts contained in the presentence report . . . ," the record was left completely unclear which facts the court was finding, the government's version or the defendants'. Combined with the court's contradictory assertions, first that it was making complete findings but then that it would not make findings on all disputes, the record is utterly ambiguous. Rice faces four years imprisonment, with the Bureau of Prisons and Parole Commission having to interpret an extremely muddled record regarding exactly what the court found. Since this is exactly what Rule 32(c)(3)(D) was designed to prevent, resentencing is required.

B. The Conflict Among the Circuits as to the Standards Under Which a Violation of Rule 32(c)(3)(D) Requires Resentencing

The court of appeals upheld the district court's actions on the grounds that the sentencing court had "substantially complied" with Rule 32(c)(3)(D).[7] Appendix A, App. 10. In doing so, the panel acted in conflict with numerous courts of appeals which apply a strict compliance standard. *See, e.g., United States v. DeLaVega*, 913 F.2d 861, 873 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 2011 (1991); *United States v. Fernandez-Angulo*, 897 F.2d 1514, 1516 (9th Cir. 1990) (en banc); *United States v. Blanco*, 884 F.2d 1577, 1580-83 (3d Cir. 1989); *United States v. Cortez*, 841 F.2d 456, 459 (2d Cir.), *cert. denied*, 486 U.S. 1058 (1988).

Other circuits apply a substantial compliance standard, the same used by the panel below. *See, e.g., United States v. Graham*, 856 F.2d 756, 762 (6th Cir. 1988), *cert. denied*, 489 U.S. 1022 (1989); *United States v. Weber*, 818 F.2d 14, 15 (8th Cir. 1987). Yet other circuits apply standards not completely conforming with either "strict compliance" or "substantial compliance," but probably much closer to "substantial compliance." *See, e.g., United States v. Eschweiler*, 782 F.2d 1385, 1390 (7th Cir. 1986) ("failure to strictly comply with the dictates of Rule 32(c)(3)(D) warrants resentencing only when such would further the purposes underlying the Rule."); *United States v. Bucci*, 839 F.2d 825, 834 (1st Cir. 1988), *cert. denied*, 488 U.S. 844

---

[7] The district court's actions fail even under a "substantial compliance" standard, given the significant ambiguities created by the court's various pronouncements.

(1988) (requiring resentencing only when it is plain that the court relied on challenged information). With most circuits having addressed the issue, and with a well-entrenched conflict existing, certiorari should be granted to resolve the standard of compliance required under the Rule.

The difference is not merely in the wording of the standard but in its application as well. The circuits are sharply in conflict regarding how to treat sentencings that are not strictly in compliance with the Rule. On the one hand, some courts are remanding for resentencing where there is even the slightest ambiguity regarding what the district court found or relied upon. *See, e.g., United States v. Baron*, 860 F.2d 911 (9th Cir. 1988), *cert. denied*, 490 U.S. 1040 (1989) (resentencing is required "even when it is only questionable" whether the court failed to make the requisite findings and determinations; court made explicit statement of non-reliance but other comments suggested court might have considered disputed material); *United States v. Hamilton*, 794 F.2d 1345 (8th Cir. 1986) (statement "I don't have to get into those areas and I shall not" held insufficient to conclude that court was not relying on any disputed matters); *United States v. Peterman*, 841 F.2d 1474, 1483 (10th Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989) (where four allegations of uncharged activity were disputed, statement "you went out and did it again" held not a clear finding that all four acts were committed). In these and numerous other cases the courts have acted consistently with their pronouncements, reversing on anything less than "maximum clarity," *United States v. Arefi*, 847 F.2d 1003, 1007 (2d Cir. 1988).

Other courts, to the contrary, are virtually straining to find that the district court complied with the Rule. *See,*

e.g., United States v. Perrera, 842 F.2d 73, 76 (4th Cir.), *cert. denied*, 488 U.S. 837 (1988) (where defendant objected to nine different allegations of failures to report to his probation officer, court's statement that it had read the PSI and that defendant had a "singular disregard for the law" constituted adequate finding on all nine disputes; court need not "articulate a finding as to disputed factual allegations with minute specificity"); *United States v. Cortez*, 841 F.2d 456 (court makes explicit statement that it wouldn't rely on allegation that defendant was major drug distributor; later statement that defendant's "sentence should be as a major distributor" deemed a finding; no ambiguity in record found); *United States v. Bruckman*, 874 F.2d 57 (1st Cir. 1989) (denial of motion to correct PSI deemed implied finding of everything contained in the report).

Numerous other examples from both ends of the spectrum could be presented. *See, United States v. Eschweiler*, 782 F.2d 1385, 1390 (7th Cir. 1986) (discussing conflict in circuits). There is a pronounced conflict in the circuits regarding application of Rule 32(c)(3)(D) that is affecting scores of appellate cases, and thousands of district court proceedings, each year.

C. The Conflict Among the Circuits Regarding Whether a Sentencing Court, When Presented With Numerous Allegations of Factual Inaccuracies in a Presentence Report, May Address All Disputes Through a Single General Finding, Rather Than a Specific Finding as to Each Disputed Matter

As mentioned above, the Ninth Circuit found "substantial compliance" with Rule 32(c)(3)(D) because of the

court's general statement, finding as facts the "facts set forth in the presentence report." The Ninth Circuit's acceptance of such a general finding conflicts directly with decisions from other circuits.

Two opinions have squarely addressed such global, non-specific findings and have found them wanting. In *United States v. Shyres*, 898 F.2d 647 (8th Cir.), *cert. denied*, 111 S.Ct. 69 (1990), the district court stated, "Any matters to which no finding is made above, matters controverted are not being taken into account of sentencing. Therefore, no finding as to their accuracy is necessary." 898 F.2d at 659. The Eighth Circuit held that this attempt to refer to matters generically was insufficient under Rule 32(c)(3)(D). It remanded for resentencing, requiring explicit statements regarding each disputed matter.

Similarly, in *United States v. Golightly*, 811 F.2d 1366 (10th Cir. 1987), the Tenth Circuit rejected the use of global references to the disputed issues:

> Although the district court held there were no inaccuracies in the presentence report, it did not recite the defendant's contentions and make the specific written findings or determination required by the rule.
>
> The purpose of Rule 32 is to ensure that the defendant's sentence is based on accurate and reliable information and that subsequent recipients of the report are *explicitly* and *specifically* apprised of the court's basis for the sentence imposed. The findings must be adequately detailed for this purpose and use.

811 F.2d at 1367 (emphasis supplied). *See also United States v. Morgan*, (4th Cir. 1991) No. 90-5701, August 1, 1991, 1991 Westlaw 141026 (court's statement that it adopted PSI "in toto" inadequate unless context makes

clear that court intended to rule on each of the alleged factual inaccuracies).

Thus, the Fourth, Eighth and Tenth Circuits have subscribed to an approach diametrically opposed to the Ninth's. However, other circuits have come to the same conclusion as the Ninth, that there need not be specific findings articulated on each dispute. *See, e.g., United States v. Moran*, 845 F.2d 135 (7th Cir. 1988) (court's statement that it was accepting all of the controverted matters in the PSI constituted an adequate finding). Given the temptation district courts may have to conserve time in complex sentencings by avoiding making specific findings on each dispute, this conflict in the circuits will be presented frequently in the future and warrants review by this Court.

In short, the need for Supreme Court action in this case is great, both to correct the inequities of this specific case and to resolve a series of conflicts in the circuits.[8] Rule 32(c)(3)(D) is implicated in nearly every criminal case and serves a critical role. Yet the appellate courts cannot even agree on the general standard to apply, "strict compliance" or "substantial compliance." Nor can they concur on what sort of record the district court must

---

[8] There is also a conflict in the circuits regarding the appropriate remedy if a violation of Rule 32(c)(3)(D) is found. *Compare United States v. Bucci*, 839 F.2d at 834 (allowing remand for indication whether disputed matters were relied upon; resentencing required only if they were) *with United States v. Fernandez-Angulo*, 897 F.2d 1514, 1516 (9th Cir. 1990) (en banc) (resentencing always required for failure to make required findings). If certiorari is granted and the Court concludes that Rule 32(c)(3)(D) was violated, it will have occasion to resolve this conflict as well.

make, such as the propriety of global versus specific findings. As to Bruce Rice, he faces four years incarceration, the conditions and exact length of which will be significantly affected by an utterly ambiguous sentencing record. The implications for Rice and Rice Aircraft justify a writ of certiorari so that they may be resentenced on an appropriate record.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

DATED October 14, 1991.

ALAN ZARKY*
DAN R. DUBITZKY
DAN R. DUBITZKY, P.S.
1011 Western Avenue
Suite 803
Seattle, WA 98104
(206) 467-6709

MICHAEL P. RUARK
INSLEE, BEST, DOEZIE & RYDER, P.S.
2340 130th Ave. N.E.
Building D
P.O. Box C-90016
Bellevue, Washington 98009-9016
(206) 455-1234

*Counsel of Record for Petitioners

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRUCE J. RICE, Defendant-Appellant.	No. 90-30125 DC No. CR-89-242-TSZ
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICE AIRCRAFT, INC., Defendant-Appellant.	No. 90-30134 DC No. CR-89-242-TSZ MEMORANDUM* (Filed July 8, 1991)

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted February 7, 1991
Seattle, Washington

Before: WIGGINS, O'SCANNLAIN, and T.G. NELSON, Circuit Judges.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

Bruce Rice and Rice Aircraft appeal their convictions for conspiracy and mail fraud.

I

We first consider Rice's motion to strike various portions of the government's opening brief. The government included in its brief the qualifications of the various defense counsel and various allegations as to who authored pertinent provisions of the plea agreement. Rice maintains that since this material was not before the trial court, this court should likewise not consider the material.

We agree. Matters which were not before the trial court will be stricken, even if they are before this court by stipulation of the parties. *United States v. Kennedy*, 890 F.2d 1056, 1058 n.4 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1308 (1990). Here, there was not even such a stipulation. Accordingly, the motion to strike is granted; the material sought to be stricken will be disregarded.[1]

---

[1] The qualifications of defense counsel could be judicially noticed pursuant to Federal Rule of Evidence 201(b). Likewise, the correspondence contained within the government's supplemental excerpts of record was before the district court, although the court never made any findings of fact regarding authorship of the plea agreement. Thus, some of the material might be properly before this court. However, these items have no relevance to the issues raised on appeal. Accordingly, we grant the motion to strike these items as well. *Cf. Michenfelder v. Sumner*, 860 F.2d 328, 338 (9th Cir. 1988).

II

Federal Rule of Criminal Procedure 11(c)(1) requires that the district court, "before accepting a plea of guilty, . . . personally address the defendant in open court and inform him of, and determine that he understands, the maximum possible penalty provided by law." *United States v. Jaramillo-Suarez*, 857 F.2d 1368, 1369 (9th Cir. 1988) (quotation omitted). Under Rule 11, a trial court need not inform the defendant of the actual sentence to be imposed but, rather, need only inform the defendant of the maximum sentence possible provided by law, including the effect of any special parole or supervised release term. *See, e.g., United States v. Clay*, 925 F.2d 299, 303 (9th Cir. 1991). In the standard case, a recitation of the statutorily-prescribed sentencing options satisfies the requirement. Cases involving plea agreements, however, present a unique twist to this general rule. Since a district court is bound by the terms of a plea agreement if the court accepts the agreement, *see* Fed. R. Crim. P. 11(e)(3), the "maximum possible penalty provided by law" becomes that available under the plea agreement. Thus, Rice correctly asserts that a district court must ensure that the defendant is aware of the full sentencing consequences under a plea agreement.

However, subsection (h) of Rule 11 provides that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." "A 'substantial right' amounts to knowledge of the statutory maximum and minimum terms applicable to the relevant charges." *United States v. Ramos*, 923 F.2d 1346, 1357 (9th Cir. 1991). A Rule 11 violation is harmless if the record reveals that the defendant had "actual

knowledge of sentencing consequences of his guilty plea." *United States v. Kearney*, 750 F.2d 787, 790 (9th Cir. 1984). We find that Rice was aware of the consequences of probation and, accordingly, need not decide if the district court erred in failing to explain these consequences to Rice.

The record clearly establishes that Rice knew the maximum penalties for each of the three counts. The plea agreement states that "[e]ach of the three counts in the Information contains a maximum period of incarceration of five years." In addition, Rice conceded in open court that he had read a document that set forth the maximum sentence in precise terms.[2] At the Rule 11 hearing, the following colloquy occurred between Rice and the district court:

---

[2] Rice maintains that we should not consider the contents of the plea agreement, noting that we have held that "[t]he dictates of Rule 11 and the federal policy of fair and efficient judicial administration require that the reviewing court look solely to the record of the plea proceeding." *United States v. Kamer*, 781 F.2d 1380, 1383 (9th Cir.), *cert. denied*, 479 U.S. 819 (1986). Here, finding that Rice knew the maximum possible sentence would not violate the holding in *Kamer*, as the record of the Rule 11 proceeding reveals that Rice read, "in detail," a document setting forth the information. This is all *Kamer* requires. *See United States v. Grewal*, 825 F.2d 220, 222 (9th Cir. 1987) (where defendant admitted on the record that he had read presentence report which recommended restitution as a penalty, and had discussed the report with his attorney, defendant was found to be aware of the possibility of restitution).

THE COURT:	Mr. Rice, have you reviewed this eight-page plea agreement in detail?
THE DEFENDANT:	Yes, I have.
THE COURT:	Have you discussed it with your attorneys?
THE DEFENDANT:	Yes.
THE COURT:	Is this your signature on page eight of the plea agreement, dated August 14, 1989?
THE DEFENDANT:	Yes, it is.

Likewise, Rice knew that probation could be imposed on counts two and three. The court asked Rice: "And the plea agreement, if accepted by the Court, would involve probation on Counts II and III. Is that your understanding?," to which Rice responded "Yes, sir." Thus, Rice, by his own admission, knew both the maximum sentences possible for all three counts, and that, under the plea agreement, he could receive probation for counts two and three.

Nonetheless, Rice reasons that his understanding was still deficient for Rule 11 purposes; awareness of the possibility of probation was not tantamount to an understanding that, if placed on probation, he could ultimately be imprisoned for an additional ten years should he violate the conditions of probation. Put simply, Rice argues that he was never told of the relationship between the maximum statutory penalty (5 years per count) and the perceived maximum penalty under the plea agreement (probation).

The relationship between the statutory penalty and probation is inherent in the very concept of probation. Probation is to provide an opportunity for the "unhardened offender . . . to rehabilitate himself without institutional confinement . . . under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuses the opportunity." *Roberts v. United States*, 320 U.S. 264, 272 (1943). Thus, upon revocation of probation where imposition of sentence had been suspended, the sentencing court may impose any sentence it originally might have imposed. *See United States v. McDonald*, 611 F.2d 1291, 1295 (9th Cir. 1980). Here, Rice acknowledge in open court that he understood that he could receive probation for counts two and three. While we do not presume sophisticated legal knowledge on the part of a defendant, it is difficult to imagine how Rice's vision of probation would differ from the correct definition. It would appear self-evident that the court would retain some form of coercion, i.e., the possibility of incarceration, over the defendant to ensure the defendant's compliance with the conditions of probation. The district court was not obligated to define the term "probation."

Moreover, in determining whether the defendant understood the consequences of his or her plea, the reviewing court may consider the defendant's education, age, intelligence, alacrity of response, and presence of counsel. *See Kamer*, 781 F.2d at 1384. Rice is a well-educated, sophisticated business person. He admitted discussing the terms of the plea agreement "in detail" with his counsel. Indeed, as a result of the plea negotiations, Rice had much greater input as to his possible sentence

than many defendants. Thus, Rice's plea of ignorance is unpalatable under the facts of this case. Any error by the district court in failing to explain the consequences of probation to Rice (an issue we do not reach today) was harmless.

III

When a defendant challenges the factual accuracy of any matters contained in the presentence report, Rule 32(c)(3)(D) requires the district court either (i) to make a finding as to the allegation, or (ii) to determine that no such finding is necessary because the controverted matter will not be considered at sentencing. *See United States v. Fernandez-Angulo*, 897 F.2d 1514, 1516 (9th Cir. 1990) (en banc). If the district court fails to make the required findings or determinations, the sentence must be vacated and the defendant resentenced. *Id.*

A

To support their contention that their objections were sufficiently specific, the defendants urge upon us caselaw in which rather general allegations of presentence report inaccuracies were found to warrant further inquiry by the district court. *See, e.g., United States v. Williamsburg Check Cashing Corp.*, 905 F.2d 25, 27, 29 (2d Cir. 1990) (counsel's dispute about allegations "relating to other activities" sufficient to trigger need for factual finding by district court); *United States v. Reynolds*, 801 F.2d 952, 957-58 (7th Cir. 1986) (defendant's statement that he agreed with list of objections prepared by counsel required further

inquiry by court, even though the list had not been provided to the court). In contrast, the government posits authority for its contention that the district court has no Rule 32 obligations "unless the defendant asserts with specificity and clarity each factual mistake of which he complains." *United States v. Hurtado*, 846 F.2d 995, 998 (5th Cir.) (quotation omitted), *cert. denied*, 488 U.S. 863 (1988); *see also United States v. Aleman*, 832 F.2d 142, 145 (11th Cir. 1987); *United States v. Carmel*, 801 F.2d 997, 1000 (7th Cir. 1986). Neither line of authority is necessarily relevant to the present case. We are not presented with a defendant who, like the defendants in *Reynolds* and *Williamsburg*, alleges a factual dispute with the presentence report but fails to elaborate in any manner. Likewise, we are not concerned with a defendant who merely alleges that the presentence report was a "big mistake," *see Hurtado*, 846 F.2d at 998, or disagrees with the "tone" or "prosecution's version" of the presentence report, *see Aleman*, 832 F.2d at 145. Rather, we are confronted here with defendants who, if anything, have obfuscated their objections by thrusting upon the district court a monstrous sentencing memorandum, leaving the district court to ferret its way through the massive document, segregating statements inconsistent with the presentence report from those that are not.

There can be no doubt that the defendants would have waived their right to specific findings or determinations under Rule 32 if the obfuscation of their objections had been deliberate. This is, however, a determination which we shall not attempt to make in the first instance; the district court is in a far superior setting to make such a finding. Here, the defendants justified their voluminous sentencing memorandum by deeming it necessary to

respond to the government's alleged campaign of misinformation. The district court apparently accepted this explanation, as it voiced no objection to the memorandum and, indeed, rebuffed the government's request that the defendants specify their objections more clearly. We have grave reservations over the defendants' failure to itemize its objections, and then to complain when the district court likewise fails to itemize its findings. Nonetheless, in light of the district court's apparent acceptance of the sentencing memorandum and Rule 32's mandate of strict compliance, *see Fernandez-Angulo*, 897 F.2d at 1516, we shall proceed to the merits of the defendants' contentions.

B

"When a district court confronts a challenge to the accuracy of information in a presentence report, it should explicitly state for the record either its finding regarding the challenge, or its decision not to take the matter controverted into account when imposing sentence." *United States v. Rico*, 895 F.2d 602, 603 (9th Cir. 1990) (quotation omitted). "[T]he district court should make clear on the record its resolution of all disputed matters, and . . . specific findings of fact are to be encouraged." *United States v. Rigby*, 896 F.2d 392, 394 (9th Cir. 1990). However, we have affirmed a sentence where the district court has "substantially complied" with Rule 32. *See United States v. Feldman*, 853 F.2d 648, 665 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989); *accord United States v. Graham*, 856 F.2d 756, 762-63 (6th Cir. 1988) ("Where the record suggests that a trial court did not rely upon disputed information in fashioning a defendant's sentence,

the trial court has substantially complied with the mandates of Rule 32(c)(3)(D) even though it failed to make any express finding or determination of the disputed fact."), *cert. denied*, 489 U.S. 1022 (1989). Here, the district court "substantially complied" with Rule 32, if in fact it did not *fully* comply with the rule. The court's lengthy recitation of the facts following presentation by counsel demonstrated that it had mastered the facts in this complex case. Accordingly, the court's statement that it would find as facts those listed in the presentence report, as modified by specific findings, was not a perfunctory statement designed to dispose of numerous objections quickly and without consideration. Rather, the record suggests that the district court reviewed all of the material before it, and adopted those facts in the presentence report because it found them to be true.

Nonetheless, the defendants contend that the district court expressly refused to make certain findings. However, when viewed in context of the entire record, the defendants' interpretation of the district court's statements carries little weight. The statements were not a shirking of duty, but a declaration that the district court would not hold an evidentiary hearing on the issues. Since Rule 32 does not require an evidentiary hearing for every controverted matter, *see United States v. Monaco*, 852 F.2d 1143, 1148 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989), this was not error. The district court's findings and determinations satisfied the requirements of Rule 32.

IV

The defendants contend that the sentences imposed by the district court exceeded that permitted by the plea agreement.

A

The government concedes that probation was not part of the plea agreement with Rice Aircraft, and agrees that Rice Aircraft should be resentenced. We also agree. Rice Aircraft's sentence is vacated, and the matter remanded for resentencing.

B

A plea agreement is contractual in nature and subject to contract-law standards. *United States v. Partida-Parra*, 859 F.2d 629, 633 (9th Cir. 1988). "Any dispute over the terms of the agreement must be resolved by determining, under an objective standard, what the parties to the plea bargain reasonably understood to be the terms of the agreement." *Id.* The plea agreement in the present case provides that "the sentences to be imposed on Counts II and III should be probationary"; the agreement is silent as to the conditions of probation. Accordingly, Rice contends that, in the absence of an express provision to the contrary, the term "probation" in the plea agreement includes only the "standard condition" – that he obey all federal and state laws. We must determine if this is a reasonable interpretation of the term probation.

In matters not involving a plea agreement, it is well established that district courts have broad discretion in

setting conditions of probation. *United States v. Polchlopek*, 897 F.2d 997, 998 (9th Cir.), *cert. denied*, 111 S. Ct. 86 (1990). A condition is valid if it is reasonable when considered in light of the rehabilitation of the probationer, the protection of the probationer's constitutional guarantees, and the legitimate needs of law enforcement in protecting the public. *Id.* If a condition is needlessly harsh, it is impermissible. *See Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980). In light of probation's rehabilitative purpose and the constraint against undue harshness, there is no reason why the term probation in a plea agreement should constrain a district court more than the same term used in a statutory context. Thus, when the term "probation" is used in a plea agreement, it includes all conditions that would otherwise be reasonable under the circumstances of the individual case unless the agreement expressly provides otherwise. The district court did not err in conditioning Rice's probation on the payment of the fines and restitution.

V

Rice claims that the district court erred in refusing to prohibit the use of such post-plea information, and, moreover, the district court should have disqualified itself from sentencing due to the taint of the prosecution's *in camera* filing.

A

The function of the grand jury is to determine whether or not a crime has been committed. *See United States v. R. Enterprises, Inc.*, 111 S. Ct. 722, 726 (1991). The

grand jury is interposed between the individual and the government, acting independently of both the prosecution and the courts. *See United States v. Hogan*, 712 F.2d 757, 759 (2d Cir. 1983). "In this independent position, a grand jury performs two distinct roles. It serves as an accuser sworn to investigate and present for trial persons suspected of wrongdoing. At the same time – and equally important – it functions as a shield, standing between the accuser and the accused, protecting the individual citizen against oppressive and unfounded government prosecution." *Id.*

In an effort to preserve the sanctity of the grand jury and to prevent abuse by such a powerful body, courts have repeatedly condemned the use of the grand jury process "for the sole or dominating purpose of preparing an already pending indictment for trial." *In re Grand Jury Proceedings (Diamante)*, 814 F.2d 61, 70 (1st Cir. 1987) [hereinafter *Diamante*] ("It is well established that a grand jury may not conduct an investigation for the primary purpose of helping the prosecution prepare for trial."). Likewise, the grand jury may not use its investigative powers for the primary purpose of helping the prosecution prepare for sentencing.

We have independently reviewed the declaration and can unequivocally state that the subpoenaed material was not used to assist the prosecution in sentencing. Moreover, any such abuse would be harmless, as the district court expressly provided that none of the results of the subpoena would be utilized at sentencing. The district court did not err in denying the defendants' motion.

B

We must still decide whether the mere perusal of the declaration required the district court to disqualify itself from sentencing. We have suggested that, in certain cases, a district court should consider removing itself from sentencing after reviewing an *in camera* submission. *See United States v. Lee*, 648 F.2d 667, 669 n.3 (9th Cir. 1981). Moreover, sealed affidavits are strongly discouraged. *See Diamante*, 814 F.2d at 72. However, the *in camera* submission process is proper where the purpose of a grand jury investigation is at issue, *see id.*, and will not result in reversal where there is no indication that the district court relied upon the *in camera* matter at sentencing and when the record provides ample independent grounds for the sentence imposed. *See United States v. Kenny*, 645 F.2d 1323, 1349 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981). Here, the district court expressly stated that it did not rely upon anything contained in the *in camera* declaration; moreover, the voluminous record contained more than ample independent grounds for the sentence imposed. The district court did not err in refusing to disqualify itself from sentencing.

AFFIRMED as to 90-30125; REVERSED and REMANDED for resentencing as to 90-30134.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRUCE J. RICE, Defendant-Appellant.	No. 90-30125 DC No. CR-89-242-TSZ
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICE AIRCRAFT, INC., Defendant-Appellant.	No. 90-30134 DC No. CR-89-242-TSZ ORDER (Filed Sept. 10, 1991)

Before: WIGGINS, O'SCANNLAIN, and T.G. NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. BRUCE JOSEPH RICE 31 Mallard Drive Lloyd Neck, N.Y. 11743 SSN: 134-34-4964 Defendant.	NO. CR89-252Z JUDGMENT AND COMMITMENT (Filed March 26, 1990)

On this 9th day of March 1990, came the attorney for the Government and the defendant appeared in person and with counsel, Dan R. Dubitzky, Darrell D. Hallett, and Richard C. Tallman.

IT IS ADJUDGED that the defendant, upon his plea of guilty, has been convicted of the offenses of violation of Title 18, United States Code, Section 371 and Section 2, as charged in Count I, and Title 18, United States Code, Sections 1341 and Section 2, as charged in Counts II and III of the Information, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the Plea Agreement between the parties be and the same is hereby accepted.

IT IS ADJUDGED that defendant is guilty as charged and is convicted on Counts I, II, and III of the Information.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of 4 years, and fined the sum of TWO HUNDRED FIFTY THOUSAND ($250,000) DOLLARS on Count I of the Information.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant shall pay the sum of TWO HUNDRED FIFTY THOUSAND ($250,000) DOLLARS to the United States for costs of prosecution.

IT IS ADJUDGED that the defendant pay a fine to the United States in the sum of ONE HUNDRED TWENTY-FIVE THOUSAND ($125,000) DOLLARS on Count II of the Information.

IT IS ADJUDGED that the defendant pay a fine to the United States in the sum of ONE HUNDRED TWENTY-FIVE THOUSAND ($125,000) DOLLARS on Count III of the Information.

IT IS FURTHER ORDERED that the imposition of sentence of imprisonment is hereby suspended as to Counts II and III, and the defendant is placed on probation for an additional period of three (3) years upon his release from confinement under Count I on the following terms and conditions:

1. That he shall complete payment of the costs of prosecution above required in the amounts and at the times directed by the Probation Department.

2. That he shall complete payment of the fines above required and statutory interest in the amounts and at the times directed by the Probation Department.

3. That he shall complete payment of the restitution to be determined by the Court in the amounts and at the times directed by the Probation Department.

4. That he obey all local, state, and federal laws.

5. That he comply with the rules and regulations of the Probation Department.

IT IS FURTHER ORDERED that the defendant shall pay an amount of restitution up to ONE MILLION ($1,000,000) DOLLARS as shall be determined by the Court in subsequent proceedings in this case. Any such obligation ~~for the period subsequent to June 1, 1985,~~ [initials of judge appeared in margin of original text] shall be joint and several with the restitution obligations of co-defendant Rice Aircraft, Inc., imposed in this action.

IT IS FURTHER ORDERED that the defendant is being sentenced as if the entirety of his unlawful conduct occurred between January 1, 1979, and October 31, 1987, prior to the effective date of the Federal Sentencing Guidelines Act of 1987.

IT IS FURTHERED ORDERED that the defendant Bruce J. Rice shall self-surrender at the time and place specified by the Probation Department.

The Court recommends to the Bureau of Prison that the defendant's "good time" be computed under the provisions effective prior to the effective date of the Federal Sentencing Guidelines Act of 1987.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this Judgment and Commitment to the probation officer of this Court, one of which shall be delivered to the defendant by the Probation Department.

DATED this 23rd day of March, 1990.

/s/ Thomas S. Zilly
UNITED STATES
DISTRICT JUDGE

Presented by:

/s/ Bruce D. Carter
BRUCE D. CARTER
Assistant United States Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. RICE AIRCRAFT, INC., a corporation Defendant.	NO. CR89-242Z CRIMINAL JUDGMENT (Filed March 27, 1990)

On this 9th day of March 1990, came the attorney for the Government and the defendant appeared by counsel, Michael P. Ruark.

IT IS ADJUDGED that the defendant upon its plea of GUILTY, and the Court being satisfied there is a factual basis for the plea, has been convicted of the offense of violation of Title 18, United States Code, Section 371 and Section 2, as charged in Count I of the Information, and the offense of violation of Title 18, United States Code, Section 1341 and Section 2, as charged in Count II, and the Court having asked the defendant whether it has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the Plea Agreement between the parties be and the same is hereby accepted.

IT IS ADJUDGED that the defendant is guilty as charged and is convicted on Counts I and II of the Information.

IT IS ORDERED that the defendant pay to the Clerk of Court a fine of TWENTY-FIVE THOUSAND DOLLARS ($25,000) on Count I and TWENTY-FIVE THOUSAND DOLLARS ($25,000) on Count II, for an aggregate fine of FIFTY THOUSAND DOLLARS ($50,000).

IT IS ORDERED that the amount of restitution to be paid by the defendant shall be established in subsequent proceedings in this matter. The maximum amount of restitution which may be sought by the Government from codefendant Bruce J. Rice and the defendant for the defendant's suppliers and customers shall not exceed ONE MILLION DOLLARS ($1,000,000).

IT IS FURTHER ORDERED that the imposition of further sentence is hereby suspended and the defendant placed on probation for THREE (3) YEARS on the following terms and conditions:

1. That the defendant promptly pay the above described $50,000 fine.

2. That the defendant promptly file corporate income tax returns for the fiscal years ending December 31, 1985, December 31, 1986 and December 31, 1987, with the Internal Revenue Service and provide appropriate K-1 forms to its shareholders.

3. That the defendant pay the restitution as shall be ordered herein by the Court at such times and in such amounts as shall be ordered by the Probation Department.

DATED this 21 day of March, 1990.

/s/ Thomas S. Zilly
UNITED STATES
DISTRICT JUDGE

Presented by:

/s/ Bruce D. Carter
BRUCE D. CARTER
Assistant United States Attorney

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. BRUCE J. RICE, Defendant.	NO. PLEA AGREEMENT

1. This Plea Agreement ("Agreement") is between the United States of America ("The Government"), represented by David E. Wilson, United States Attorney for the Western District of Washington, and Bruce D. Carter, Assistant United States Attorney, and BRUCE J. RICE ("Defendant"), represented by Dan R. Dubitzky, P.S.; Chicoine & Hallett, P.S.; and Schweppe, Krug & Tausend, P.S.

2. Defendant agrees to enter guilty pleas in the Western District of Washington to counts I, II, and III of the Information attached hereto as Attachment A. The Government's Proffer of Evidence in support of the Information is Attachment B, and the Admissions of Bruce J. Rice Upon Plea of Guilty are Attachment C. The United States Department of Justice agrees that it will bring no further criminal prosecutions against defendant BRUCE J. RICE for the facts and allegations included in the Information, the Government's Proffer, and the Admissions of Bruce J. Rice Upon Plea of Guilty if the defendant complies with this agreement. Additional criminal federal income tax charges will not be filed against defendant Bruce J. Rice for the tax years 1982 through 1986.

Defendant BRUCE J. RICE agrees to waive Indictment and proceed by Information, waiving any and all objections to the Information based on the statute of limitations, venue, or the form of the charging Information.

3. Each of the three counts in the Information contains a maximum period of incarceration of five years. The defendant and the Government have agreed, pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, that the sentences to be imposed on Counts II and III should be probationary, so the maximum sentence of incarceration which the Court could impose at time of imposition of judgment and Sentence would be five (5) years. The parties have agreed, pursuant to Rule 11(e)(1)(C) that a fine of Two Hundred Fifty Thousand Dollars ($250,000.00) is appropriate on Count I. The Court may, in its discretion, impose an additional fine of up to Two Hundred Fifty Thousand Dollars ($250,000.00) on Counts II and III, so the maximum criminal fine which the Court may impose for all three counts is Five Hundred Thousand Dollars ($500,000.00). Sentencing shall be determined in accordance with the law prior to the effective date of the Federal Sentencing Guidelines Act of 1987. This Agreement is subject to acceptance or rejection by the Court pursuant to Rule 11(e)(2) of such rules.

4. The parties agree that the Defendant Bruce J. Rice should be ordered to pay costs of prosecution to the Government in the amount of $250,000.

5. The defendant and the Government agree to leave to the determination of the Court whether to impose restitution and the amount, if any, to be ordered.

The maximum amount of restitution which may be sought by the Government from the defendant and codefendant Rice Aircraft, Inc., could amount to as much as $1 million.

6. The defendant shall truthfully disclose all information with respect to his own activities, and those of others, concerning all matters of inquiry by or on behalf of this office and other Federal investigative representatives. The defendant shall be immune from the use of such testimony or any information directly or indirectly derived from such testimony against him in any additional prosecution, penalty, or forfeiture; but he shall not be exempt from prosecution for perjury, giving a false statement, or contempt committed while providing testimony, information, or evidence under this agreement. The United States shall obtain from an appropriate United States District Court, pursuant to 18 U.S.C. § 6003, an order of immunity for the defendant.

7. The defendant and his counsel will make themselves available for interview at all reasonable times requested by representatives of the Government and shall cooperate with all reasonable requests to assist in investigations. The defendant shall truthfully testify in the Grand Jury, and at any trial, as to any subject about which he is questioned. The defendant agrees to waive any rights to secrecy or other prohibitions under Rule 6(e) of the Federal Rules of Criminal Procedures relating to documents previously provided to the Grand Jury. He also agrees to provide all documents in the possession of or control of the defendant which are relevant to any investigation upon request of Government representatives.

8. This agreement does not apply to acts involving actual or threatened violence. While the United States Attorney's Office for the Western District of Washington has no reason to believe that the defendant has been involved in any such acts, the burden is upon the defendant to disclose, prior to the execution of this Agreement, that there may be a potential problem with such a limitation or to face the consequence that no benefit will be gained by a subsequent disclosure which would not be covered by the terms of the Agreement.

9. This Agreement cannot bind state or local prosecuting authorities, although this office will bring the defendant's cooperation to the attention of other prosecuting offices if requested by the defendant. If any other prosecuting office should commence an investigation of the defendant for the wrongdoing referred to in this Agreement, this office will, upon request, recommend to such other prosecuting agency that the terms of this Agreement be adopted as a basis for declining further prosecution.

10. This Agreement does not prohibit the United States, any agency thereof, or any third party from initiating or prosecuting any civil proceeding directly or indirectly involving the defendant.

11. The defendant must all times give complete, truthful, and accurate information and testimony. This is the essence of the Agreement. Should the defendant withdraw from this Agreement, or should it be established that the defendant has intentionally given materially false, materially incomplete, or materially misleading testimony or information, or has otherwise violated any

provision of the Agreement, this Agreement shall be null and void, and the defendant shall be subject to additional prosecution for perjury, false statement, and obstruction of justice. Any such subsequent prosecution may be premised upon any information provided by the defendant or obtained as the result of having been provided by him and such information may be used against the defendant.

12. The sentence to be imposed upon the defendant is within the sole discretion of the sentencing judge. This office cannot and does not make any promise or representation as to what sentence the defendant will receive. The defendant understands that the sentencing judge may impose the maximum sentence of imprisonment and fine as provided above. Furthermore, this office will inform the sentencing judge and the Probation Department of: (1) this Agreement; (2) the nature and extent of the defendant's activities with respect to this case; (3) the full nature, extent, and quality of the defendant's cooperation with this office and the date when such cooperation commenced; and (4) all other information favorable or otherwise in its possession relevant to sentence. It is understood that the United States specifically reserves the right to correct and comment on factual statements relating to sentencing proceedings and to oppose any application by the defendant for a reduction of sentence pursuant to Fed. R. Crim. P. 35. The Judgment and Commitment shall, however, provide that the defendant is being sentenced as if the entirety of his unlawful conduct occurred between January 1, 1979, and October 31, 1987, prior to the effective date of the Federal Sentencing Guidelines Act of 1987. The Government will not oppose

the defendant's request that the Court recommend to the Bureau of Prisons in the Judgment and Commitment that the defendant's "good time" be computed under the provisions effective prior to the effective date of the Federal Sentencing Guidelines. The defendant specifically reserves the right to file a Rule 35 motion should he desire to do so.

13. The United States reserves the right to allocute at sentencing regarding the facts and circumstances of the offense, the significance of the offense, and an appropriate sentence.

14. It is agreed that if the Court refuses to accept any provision of this Plea Agreement, if the defendant fails to perform as agreed, or if the defendant seeks to withdraw his guilty pleas, the Government may seek to dismiss the Information without prejudice. The defendant will not object to such dismissal or assert the statute of limitations as a bar to a subsequent indictment which may relate to all allegations known to the Government, except insofar as the statute of limitations could have been asserted prior to the date of this Agreement. The defendant reserves his right to object to any such new charges on the basis of venue or the form of the charging document.

15. The Government agrees to recommend to the Court and the Bureau of Prisons that defendant serve any sentence in a Federal prison camp or other Level 1 facility.

16. The Government will recommend that the Defendant not be sentenced for at least 180 days to allow

the defendant to complete all interviews with Federal investigators.

17. No additional promises, agreements, and conditions have been entered into other than those set forth in this Agreement and none will be entered into unless in writing and signed by all parties.

DATED this 14th day of August, 1989.

/s/ David E. Wilson
DAVID E. WILSON
United States Attorney

/s/ Bruce D. Carter
BRUCE D. CARTER
Assistant United
States Attorney

AGREED AND CONSENTED TO:

/s/ Bruce J. Rice
BRUCE RICE
Defendant

/s/ Dan R. Dubitzky
DAN R. DUBITZKY
Attorney for Bruce J. Rice

/s/ Richard C. Tallman
RICHARD C. TALLMAN
Attorney for Bruce J. Rice

/s/ Darrell D. Hallett/DRD
DARRELL D. HALLETT
Attorney for Bruce J. Rice

(2)

No. 91-630

In the Supreme Court of the United States

OCTOBER TERM, 1991

BRUCE J. RICE AND RICE AIRCRAFT, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court's failure to inform petitioner of the potential consequences of a probation violation constituted a violation of Fed. R. Crim. P. 11(c)(1) and, if so, whether the error was harmless under Fed. R. Crim. P. 11(h).

2. Whether the district court failed to resolve material disputes as to the accuracy of petitioner's presentence report, in violation of Fed. R. Crim. P. 32(c)(3)(D).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-630

BRUCE J. RICE AND RICE AIRCRAFT, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is unreported, but the decision is noted at 937 F.2d 614 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1991. A petition for rehearing was denied on September 10, 1991 (Pet. App. 15). The petition for a writ of certiorari was filed on October 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following pleas of guilty in the United States District Court for the Western District of Washington, petitioners Bruce J. Rice and Rice Aircraft, Inc., were convicted on one count of conspiracy, in violation of 18 U.S.C. 371, and one count of mail fraud, in violation of 18 U.S.C. 1341. Rice was convicted on an additional count of mail fraud. Rice was sentenced to four years' imprisonment, three years' probation, fined a total of $500,000, and assessed previously agreed costs of $250,000. Pet. App. 16-19. Rice Aircraft, Inc., was fined $50,000. Pet. App. 20-22. The court of appeals affirmed. Pet. App. 1-14.

1. Petitioners Bruce J. Rice and Rice Aircraft, Inc., an aircraft supply firm owned and controlled by Rice, were involved in the payment of $155,000 in kickbacks to seven representatives of the company's suppliers and customers. See Mar. 9, 1990, Sentencing Tr. 81-94. Their fraudulent activities also included the sale of structural aerospace nuts and bolts accompanied by test reports that were unrelated to the parts delivered. *Id.* at 83-86. Finally, petitioners were involved in the sale of aerospace nuts and bolts that had been secretly stripped and replated by an unapproved manufacturer and delivered with original manufacturers' test reports that did not relate to the reprocessed parts. *Ibid.*

2. On appeal, Rice claimed that he was entitled to reversal of his convictions because the district court failed personally to advise him at his Rule 11 hearing of the maximum possible sentence he faced and the terms of his probation. The court of appeals rejected that claim. Pet. App. 3-7. The court noted that Rule 11(c)(1), Fed. R. Crim. P., requires that the district court, "[b]efore accepting a plea of guilty,

* * * address the defendant personally in open court and inform [him] of, and determine that [he] understands, * * * the maximum possible penalty provided by law." Rule 11(h) provides, however, that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." The court of appeals stated that a Rule 11 violation is harmless if the record reveals that the defendant had "actual knowledge of sentencing consequences of his guilty plea." Pet. App. 3-4.

The court of appeals found that Rice knew the maximum penalties for each of the three counts on which he was convicted. The court noted that Rice's plea agreement stated in precise terms that "[e]ach of the three counts in the Information contains a maximum period of incarceration of five years." Pet. App. 4. Rice conceded in open court that he had read that document:

> THE COURT: Mr. Rice, have you reviewed this eight-page plea agreement in detail?
>
> THE DEFENDANT: Yes, I have.
>
> THE COURT: Have you discussed it with your attorneys?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Is this your signature on page eight of the plea agreement, dated August 14, 1989?
>
> THE DEFENDANT: Yes, it is.

Pet. App. 5. The court held that under the circumstances of this case, in which the record showed that the defendant read "in detail" a document setting forth his maximum sentence, it was permissible to look beyond the oral record of the plea proceeding to determine whether petitioner knew the maximum penalty to which he was exposed. The court of ap-

peals also found that Rice knew that probation could be imposed on Counts 2 and 3. The district court had asked Rice: "And the plea agreement, if accepted by the Court, would involve probation on Counts II and III. Is that your understanding?" Rice responded, "Yes, sir." *Ibid.*

The court of appeals rejected Rice's claim that he failed to apprehend that, if placed on probation, he could ultimately be imprisoned for an additional ten years if he violated the conditions of his probation. The court found that the relationship between the maximum statutory penalty of ten years' imprisonment and probation "is inherent in the very concept of probation." Pet. App. 6. "While we do not presume sophisticated legal knowledge on the part of a defendant," the court determined, "it is difficult to imagine how Rice's vision of probation would differ from the correct definition. It would appear self-evident that the court would retain some form of coercion, i.e., the possibility of incarceration, over the defendant to ensure the defendant's compliance with the conditions of 'probation.'" *Ibid.*

Moreover, the court held, in determining whether a defendant understood the consequences of his or her plea, the reviewing court may consider the defendant's education, age, intelligence, and alacrity of response, as well as the presence of counsel. Pet. App. 6. The court found that Rice was a well-educated, sophisticated businessman who admitted discussing the terms of the plea agreement "in detail" with his counsel. As a result of the lengthy plea negotiations, the court determined, Rice had much greater input as to his possible sentence than many defendants, and his plea of ignorance was "unpalatable under the facts of this case." Pet. App.

7. The court therefore concluded that any error by the district court in failing to explain the consequences of probation to Rice (an issue the court did not decide) was harmless. *Ibid.*

Both petitioners argued that the district court violated Fed. R. Crim. P. 32(c)(3)(D) in failing properly to dispose of their challenges to the factual accuracy of matters contained in the presentence report. The court of appeals first noted that it was "confronted here with defendants who, if anything, have obfuscated their objections by thrusting upon the district court a monstrous sentencing memorandum, leaving the district court to ferret its way through the massive document, segregating statements inconsistent with the presentence report from those that are not." Pet. App. 8. The court thus harbored "grave reservations" over petitioners' failure to itemize their objections, but nonetheless decided to consider their claim. *Id.* at 9.

The court of appeals concluded that the district court " 'substantially complied' with Rule 32, if in fact it did not fully comply with the Rule." Pet. App. 10 (emphasis omitted). The court found that the manner in which the district court handled the case "demonstrated that [the court] had mastered [its complex] facts." *Ibid.* Thus, the district court's statement that it would, subject to certain specific findings, accept the facts as listed in the presentence report "was not a perfunctory statement designed to dispose of numerous objections quickly and without consideration." *Ibid.* To the contrary, the record showed that the district court reviewed all of the relevant materials and accepted the facts in the presentence report because it found them to be true. *Ibid.* The court of appeals dismissed petitioners' claim that

the district court expressly refused to make certain findings, noting that the district court had refused only to hold an evidentiary hearing on the issues, a permissible course under Rule 32. Pet. App. 10.

ARGUMENT

1. Rice contends (Pet. 9-21) that the district court's failure personally to advise him that he would be subject to incarceration if he violated the conditions of his probation amounted to a failure to apprise him of the "maximum penalty" for his offenses, and that his convictions must be reversed as a consequence.

The record reflects that Rice was accurately informed of the maximum sentence to which his guilty plea exposed him. The district court informed Rice that under the plea agreement, he faced a maximum potential term of incarceration of five years on Count 1, and terms of probation on Counts 2 and 3. See Pet. 3-4, quoting Aug. 16, 1989, Tr. 12-13. Petitioner does not dispute that he was given that information. Rather, he claims that the district court failed adequately to explain what consequences might befall him should he violate the terms of his probation. Petitioner cites no cases, and we are aware of none, requiring a district court to explain the consequences that might follow from a defendant's violation of the conditions of his probation. Cf. *Weaver* v. *United States*, 454 F.2d 315 (7th Cir. 1971) (assuming without deciding that Rule 11 requires explanation of consequences of probation violation). Indeed, with respect to post-conviction supervision, the express language of Rule 11(c)(1) requires only that the district court address "the effect of any special parole or supervised release term," and makes no reference to the effects of ordinary probation.

Even assuming that the district court erred in failing to explain to petitioner that he might be incarcerated if he violated the terms of his probation, that error was harmless under Rule 11(h), which provides that any variance from the procedure required by Rule 11 that does not affect a defendant's substantial rights "shall be disregarded." Petitioner has not shown that the alleged violation affected his substantial rights. In particular, nothing in the record suggests that petitioner would not have pleaded guilty if he had known that he could be imprisoned if he violated the terms of his probation.

Although we agree with petitioner that the courts of appeals are in conflict as to the interpretation of the harmless error provision of Rule 11(h) (see *United States* v. *Hourihan*, 936 F.2d 508, 511, n.4 (11th Cir. 1991) (per curiam) (collecting cases)), that conflict does not extend to providing warnings about the possible effects of probation revocation. The Fifth Circuit, for example, has repeatedly held that a district court's failure personally to address a defendant regarding one of the "core concerns" of Rule 11 (which include understanding the direct consequences of the plea, one of which is the maximum penalty for an offense) entitles the defendant to automatic reversal of his conviction.[1] That court, however, has never held that a failure to warn a defendant of the consequences of revocation of probation warrants automatic reversal. Indeed, a recent Fifth Circuit decision suggests that that court would apply harmless error analysis in the present situation, since a failure

---

[1] *E.g.*, *United States* v. *Bernal*, 861 F.2d 434 (1988), on reh'g, 871 F.2d 490, cert. denied, 493 U.S. 872 (1989); *United States* v. *Pierce*, 893 F.2d 669, 679 (1990); *United States* v. *Shacklett*, 921 F.2d 580, 583 (1991).

to discuss the details of probation would deal at most with one component of the core concern that the defendant understand the maximum penalty for his offense; under Fifth Circuit law, automatic reversal is not warranted in such circumstances. *United States* v. *Bachynsky*, 934 F.2d 1349, 1355 (en banc) (per curiam) (distinguishing between factors that are separate components of "core concerns" and factors that constitute distinct "core concerns"), cert. denied, 112 S. Ct. 402 (1991).[2]

In addition, this Court has in the past declined to review the conflict among the circuits regarding the proper scope of Rule 11(h). In *United States* v. *Bernal*, 861 F.2d 434 (1988), on reh'g, 871 F.2d 490 (5th Cir.), cert. denied, 493 U.S. 872 (1989), we sought review of the question whether the Fifth Circuit's rule of automatic reversal is permissible under Rule 11(h), and the Court denied certiorari. 493 U.S. 872 (1989). Earlier this Term, we acquiesced in the

---

[2] In *Bachynsky*, the district court failed to advise the defendant that his sentence could include a term of supervised release. The government argued that because the defendant's total sentence (including both imprisonment and supervised release) was less than the maximum term of imprisonment of which he had been advised, the omission could not possibly have affected the defendant's substantial rights. Applying its *per se* rule, a panel of the Fifth Circuit held that the omission constituted a complete failure to address a core concern and reversed the conviction. 924 F.2d 561 (1991). Before the full court, the government argued that the court should reexamine the automatic reversal rule, arguing that it was incompatible with Rule 11(h). While the court acknowledged that this argument was "not unpersuasive[]," it chose to dispose of the case on a narrower ground. The court held that the district court's omission constituted only a partial failure to address a core concern, which rendered the automatic reversal rule inapplicable. 934 F.2d at 1358, 1359-1360. The court then concluded that the error was harmless. *Id.* at 1360-1361.

petition for certiorari in another case raising the identical issue, and the Court once again denied certiorari. *United States* v. *Young*, 927 F.2d 1060 (8th Cir.), cert. denied, 112 S. Ct. 384 (1991). The issue on which petitioners seek review in this case is identical to that presented in *Bernal* and *Young*; there is no reason for the Court to grant this petition in light of the denials of the petitions in those cases.

2. Petitioners renew their contention that the district court erred in failing to resolve disputes over factual material in the presentence report, or to disclaim reliance upon the disputed material once it decided not to resolve those disputes. Under Fed. R. Crim. P. 32(c)(3)(D), the district court is required to make findings as to the accuracy of facts contested at sentencing or to make a determination that such findings are unnecessary because the court does not intend to rely on the disputed facts at sentencing.

As petitioners concede (Pet. 8), they never identified the specific factual statements in the presentence report that they thought were without basis. Petitioners chose instead to present their factual contentions as part of a rambling discourse on the facts of this highly complex case. Pet. App. 8. In their submission to this Court, petitioners assert that the presentence report—and the district court—failed to resolve the following factual disputes: (a) whether the illegal kickbacks were in fact "extorted" from Rice; (b) whether the replating of aerospace nuts and bolts sold by Rice Aircraft posed a potential safety problem; and (c) whether customers relied on Rice Aircraft's submission of inaccurate test results concerning the nuts and bolts. See Pet. 6-7. The record discloses, however, that the district court considered and disposed of each of these issues.

As to the alleged "extortion" of the payoffs, Rice himself admitted at sentencing that the payoffs were a combined product of "fear, inexperience, embarrassment. * * * But no matter which way you go, the result is poor judgment and it's the same. The payments are wrong. And I admit it. * * * I should have said no." Mar. 9, 1990, Sentencing Tr. 65. The district court noted, moreover, that the payments of $155,000 over the period of 1982 through August 1987 were made "under elaborate procedures to conceal payment * * * for the purpose of gaining a competitive advantage in the industry, and * * * Rice Aircraft did in fact obtain an advantage as a result of these illegal payments." *Id.* at 92.

As to the safety implications of petitioners' crimes, the district court stated:

> Rice's arguments that only a few instances have been shown and no safety problems have been proven misses [*sic*] the mark. The industry and the public have been deprived of important safety information for essential elements in the aircraft production process. The actions of the defendants would put at risk numerous parts supplied to various aircraft companies over a long period of time.

Mar. 9, 1990, Sentencing Tr. 89-90. The district court thus rejected petitioners' contention that safety concerns were not implicated by their actions.

Finally, the district court rejected petitioners' claim that the industry did not rely upon the inaccurate representations concerning test results. The court stated that a "customer is obviously going to rely upon" test reports, and that it made no difference that the reports were accurate with respect to other parts. Mar. 9, 1990, Sentencing Tr. 86. The court rejected peti-

tioners' argument that the test reports were inconsequential, noting that petitioners would not have submitted the false reports "if it wasn't important to hide what they were doing." *Id.* at 87. The district court concluded that the "industry did in fact rely and they were entitled to rely upon [the falsified test] certificates." *Ibid.*

In sum, each of the disputed factual contentions that petitioners raise in this Court was resolved by the district court. Nothing raised in the petition demonstrates anything but "strict compliance" with Rule 32(c)(3)(D).

Because the district court resolved the factual disputes brought to its attention, this case does not present a need to resolve any conflict that may exist among the circuits regarding whether Rule 32(c)(3)(D) demands "strict" rather than "substantial" compliance.[3] Thus, although some circuits require less than "strict compliance" with Rule 32(c)(3)(D), see Pet. 25-30, a decision by this Court that "strict compliance" is required would not benefit petitioners.[4]

---

[3] Moreover, the fact that the district court specifically resolved the factual disputes brought to its attention by petitioners obviates any need for review of the asserted conflict among the circuits regarding the sufficiency of a district court's general resolution of disputed factual matters in a presentence report. See Pet. 27-30.

[4] Although the Ninth Circuit panel in this case did not decide whether strict compliance or substantial compliance is required, we note that the Ninth Circuit en banc has held that strict compliance is required, thus adopting the rule for which petitioner contends. *United States* v. *Fernandez-Angulo*, 897 F.2d 1514, 1516 (1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45241

(3)

No. 91-630

In The

Supreme Court of the United States

October Term, 1991

BRUCE J. RICE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

RICE AIRCRAFT, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO GOVERNMENT'S OPPOSITION

ALAN ZARKY*
DAN R. DUBITZKY
DAN R. DUBITZKY, P.S.
1011 Western Avenue
Suite 803
Seattle, WA 98104
(206) 467-6709

MICHAEL P. RUARK
INSLEE, BEST, DOEZIE & RYDER, P.S.
2340 130th Ave. N.E.
Building D
P.O. Box C-90016
Bellevue, Washington
98009-9016
(206) 455-1234

Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO THE GOVERNMENT'S ASSERTIONS, THIS CASE DOES NOT INVOLVE THE "AUTOMATIC REVERSAL" RULE FOLLOWED BY SOME CIRCUITS, BUT CONCERNS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING HOW HARMLESS ERROR MAY BE DEMONSTRATED UNDER RULE 11(*h*)

The government's opposition on the Rule 11 issue consists of three main threads: a rehash of the Ninth Circuit's harmless error analysis, the hint that the failure to advise Rice of the maximum imprisonment he faced was not error at all, and the contention that this Court has twice denied certiorari on the issues presented here. We respond briefly to these three points in turn.

The opinion below and the government's opposition both contend that the plea agreement provided Rice with adequate notice of what suspended term of imprisonment he faced. In doing so, they correctly state that any defendant would realize that with probation, "the court would retain some form of coercion, i.e. the possibility of incarceration . . . " Opp. 4. But the crucial question is, how lengthy might that incarceration be? This, Rice was never told.

The government, citing to the panel opinion, contends that the plea agreement provided Rice with this essential information by referring to the statutory maximum, concluding that Rice thereby necessarily knew his suspended sentence could be up to the statutory maximum. Yet, as the Ninth Circuit conceded, Pet. App. 3, the critical question in a Rule 11(e)(1)(C) agreement is not what the statute authorizes, but what the agreement allows. The agreement's mention of the statutory maximum told Rice nothing about what suspended sentence would be permissible under the plea agreement. After all,

the agreement by its terms made clear that the court had to impose less than the statutory maximum. For example, although the agreement recited the statutory maximum of five years for each count, or fifteen years total, all parties agree that Rice could not receive more than five years immediately.

A fair analysis of the agreement is, at the most, that it might have suggested to Rice that he faced fifteen years, but not that Rice *necessarily knew* this from reviewing the document. But since the document is the only evidence that Rice had an understanding beyond the Rule 11 advisement, harmless error could only be found if that document unequivocally informed Rice of the true maximum sentence.

Secondly, the government briefly raises the suggestion that Rice need not have been told how lengthy his suspended term of imprisonment would be. Opp. 6. We submit that the suggestion is clearly incorrect. If a defendant is told that he might receive, for example, five years imprisonment, but ultimately receives probation, then he pled guilty knowing he could receive five years, and can have no complaint if probation is later revoked and the imprisonment imposed. However, if a defendant is wrongly told that his plea agreement allows, for example, only five years imprisonment, but he then receives a ten year term, he can not be said to have known the consequences of his plea, even if part of the imprisonment is suspended and might only be imposed later. So too, Rice, expressly told by the prosecutor that he faced five years imprisonment, was misled into pleading guilty, since he in fact now faces fourteen years imprisonment.

Finally, and most importantly, the government mischaracterizes the issue by suggesting that the inter-circuit conflict we raise involves the "automatic reversal" rule. Opp. 7-8. As our Petition clearly stated, the problem is

not that the Ninth Circuit applied a harmless error analysis, but that the court *misapplied* the harmless error rule. To find that the court's failure to advise Rice properly was harmless error, the panel should have required some direct evidence, through Rice's responses, that he understood the consequences of his plea. Instead, the panel applied its own interpretation of ambiguous language in the plea agreement and then assumed that Rice must have understood the document in the same way. As discussed in detail in our Petition at 14-16, the Ninth Circuit's approach is squarely in conflict with several decisions in other circuits, with the pronouncements of this Court, and with the purposes behind Rule 11(h), as explained in the Advisory Committee Notes.

Thus, the government misstates the issue when contending that certiorari should be denied because the existing conflict in the circuits has not "extend[ed] to providing warnings about the possible effects of probation revocation." Opp. 7. The ongoing conflict among the circuits discussed in our Petition directly implicates this case. That conflict is over how a court may conclude that a defendant knew his true maximum sentence (despite an improper advisement) and thereby treat the error as harmless. Is the court limited to direct evidence, from the defendant's own responses, of the defendant's knowledge? Or may a court instead make assumptions about the defendant's knowledge from a document, with no showing of whether the defendant understood that document at all, or what he understood it to mean?

This case therefore has little to do with the automatic reversal rule of the Fifth Circuit (although Rice might benefit if this Court adopted that rule, since advisement of the maximum sentence is among Rule 11's "core concerns.") This case has everything to do with the intercircuit conflict over what evidence of a defendant's

knowledge must exist to find harmless error. This case also directly implicates another split among the circuits, one discussed in our Petition but not addressed by the government – what standard of proof applies before a court may find harmless error. See Pet. 18-19.

The government is therefore incorrect in asserting that this Court has twice denied certiorari when presented with the same question as in this case, citing to *United States v. Bernal*, 861 F.2d 434 (1988), on reh'g, 871 F.2d 490 (5th Cir.), *cert. denied*, 493 U.S. 872 (1989) and *United States v. Young*, 927 F.2d 1060 (8th Cir.), *cert. denied*, 112 S.Ct. 384 (1991). The question presented in both *Bernal* and *Young* was whether the terms of Rule 11(h) were inconsistent with the Fifth Circuit's rule of "automatic reversal" for a court's failure to address Rule 11's "core concerns." As discussed above, although the "automatic reversal" rule is the subject of a conflict in the circuits regarding Rule 11(h), that conflict is not what provides grounds for certiorari in this case.[1]

The government makes one curious comment which demands a response. It suggests that we cannot show a violation of a substantial right, as required by Rule 11(h), because "nothing in the record suggests that petitioner would not have pleaded guilty if he had known" that he faced fifteen years imprisonment, instead of the five

---

[1] To the extent the issue presented here is deemed similar to that in *Bernal* and *Young*, the repeated presentation of the issue to this Court suggests that the need for the conflict to be resolved is a continuing one, and may suggest that this Court now grant certiorari, even if certiorari was previously thought unwarranted. It is also inconsistent for the government to request certiorari in *Bernal* and acquiesce to certiorari in *Young*, but then oppose certiorari in this case.

years the prosecutor stated. Opp. 7. Under the government's test, no Rule 11 violation would ever be cognizable on appeal, because the showing suggested by the government can only be made by supplements to the record, such as in the evidentiary submissions made with a habeas petition. The courts of appeal have always required such a showing when a Rule 11 violation was the subject of a collateral attack, but to our knowledge have never required a defendant to show on direct appeal that had he properly been advised on the maximum sentence, he would have gone to trial. We would ask just how the government believes such a showing could ever be made on direct appeal, other than to assert it in a brief on appeal, which in fact we did (Opening Brief, CA No. 90-30125, p. 12).

In sum, because this case squarely presents a conflict among the circuits over the harmless error analysis to be applied to violations of Rule 11 (a Rule implicated in every guilty plea), this Court should grant certiorari.

II. AS RECOGNIZED BY THE COURT OF APPEALS, THE DISTRICT COURT DID NOT SPECIFICALLY ADDRESS THE MATTERS DISPUTED AT SENTENCING; THIS CASE DIRECTLY TURNS ON THE ISSUES SUBJECT TO CONFLICT WITHIN THE CIRCUITS, INCLUDING THE "SUBSTANTIAL COMPLIANCE" STANDARD RELIED UPON BY THE COURT OF APPEALS AND THE PROPRIETY OF NON-SPECIFIC FINDINGS UNDER RULE 32

The government does not dispute at all the existence of various conflicts among the circuits regarding

application of Rule 32(c)(3)(D).[2] Instead, the government's *sole* basis for opposing certiorari is the contention that the district court specifically resolved each factual dispute brought to its attention. Opp. 9. Since that contention is demonstrably false, the government posits no valid reason for opposing certiorari.[3]

The government makes its assertion only by characterizing the record as to what sentencing matters were in dispute. Notably, not even the court of appeals contended that all disputed matters had been addressed with specificity by the district court. Instead, to uphold the district court, the Ninth Circuit relied upon a non-specific, all-inclusive "finding" made by the district court, the propriety of which is subject to a conflict among the circuits.

To support its position, the government contends that we have identified only three factual disputes unresolved by the district court. Opp. 9. To the contrary, we specified on appeal twelve different disputes which the district

---

[2] As discussed in our Petition, the conflicts include a split over whether "strict" or "substantial" compliance with the Rule is necessary, a split which is not merely linguistic but has resulted in widely diverging applications of the Rule. Pet. 25-27. In addition, the circuits have split over the propriety of addressing sentencing disputes in a single, general statement, as opposed to specific findings as to each disputed matter. Pet. 27-29.

[3] Without the entire record, this Court is in an uncomfortable position, faced with the government's contention that all factual disputes were resolved by the district court, and our contention to the contrary. As the ensuing discussion will show, the government's concessions on appeal, combined with the Ninth Circuit's interpretation of the record, make clear that the district court did not make specific findings on each matter, and that the sentencing can only be upheld if the district court's non-specific "findings" of the court were legally sufficient, exactly the issue which warrants certiorari.

court did not address. Opening Brief of Bruce Rice, pp. 32-34, included here at Supp. App. 1-2.[4]

In our Petition for Certiorari, when summarizing the course of the proceedings, we gave this Court a brief overview of the *categories* of disputes presented to the district court. Pet. 6. We specifically stated that these descriptions were simply "for example." The sole purpose of that discussion was to give this Court some understanding of the breadth of the sentencing disputes. It was not to itemize the specific disputes that we contended were unresolved in violation of Rule 32(c)(3)(D). The Petition was not the proper forum for discussing with particularity these specific disputes. If this Court grants certiorari, the Brief on the merits will provide the opportunity for that level of detail.

It is fairly audacious for the government to suggest that we contended there were only three factual disputes unresolved by the court. The appellate record made abundantly clear that there were twelve such disputes,

---

[4] The government contends that we presented our factual contentions to the district court "as part of a rambling discourse." Opp. 9. In fact, we provided detailed factual contentions within the lengthy written sentencing submissions. Our opening appellate brief cited specific page references in the sentencing material where the contentions had been made, Supp. App. 1-2; our reply brief on appeal quoted the headings from those pages, showing how specific our contentions had been. Our only arguable failure was in not identifying the specific pages where the presentence report had discussed the issues we disputed. However, as the court of appeals recognized, the district court found our method of presentation acceptable and rejected the government's request for a "chapter and verse" citation to the presentence report.

and the government attempted to discuss all twelve disputes on appeal.[5]

Thus, for example, the question of safety referred to in our statement of facts had several different components. Rice disputed whether parts were improperly replated, whether replated parts were ever tested, the extent to which testing was required, and whether replating must be performed by only certain facilities. Supp. App. 1. The district court did not make specific findings on any of these disputed matters. The court's observation that Rice deprived customers of "safety information," quoted at Opp. 10, does not at all address whether Rice's actions actually caused parts to be unsafe. Yet that was what the government and the presentence report contended and Rice disputed.

The court of appeals never suggested that the district court had resolved each factual dispute through specific findings. Instead, it found that the district court had "substantially complied" with the Rule, and in so finding, it relied heavily on the district court's general statement, finding as facts those listed in the presentence report. Pet.

---

[5] On appeal, the government did not contend that the court had specifically addressed all twelve disputed matters. (Government's Brief on Appeal in CA No. 90-30134, as to factual disputes 7, 9, 10, 11, and 12, pp. 17-21; included here at Supp. App. 4-8.) In fact, the government conceded that some of the disputes had not been specifically addressed, Supp. App. 4, and, like the Court of Appeals, relied upon the district court's general "finding." Supp. App. 7-8. The government also claimed that several of the unresolved disputes were "irrelevant," Supp. App. 5, 6, as if that somehow excused the court from complying with its two choices under Rule 32(c)(3)(D), either disclaiming reliance or resolving the dispute.

App. 10.[6] Therefore, the court of appeals decision depends directly on a legal holding as to the sufficiency of such general statements under Rule 32(c)(3)(D), an issue subject to a split among the circuits.[7]

Similarly, the government mischaracterizes the factual issues in dispute as to illegal payments. We presented five different disputes to the district court relating to those payments, including whether the payees were paid to have Rice Aircraft receive extra business, to interfere with competitors' business, or to provide mismatched test reports, and whether payments were made in response to extortionate threats. Supp. App. 1-2. The district court's simple statement that Rice Aircraft obtained an advantage through the payments addressed an undisputed matter. The disputes were over what *specific* advantages Rice Aircraft obtained, and whether the payments were obtained through extortion. These matters were never resolved through specific findings and the court of appeals did not suggest otherwise.

Thus, the government is utterly incorrect in asserting that resolution of the circuit conflict between "strict" and "substantial" compliance would not benefit Rice. The court of appeals directly relied upon the "substantial

---

[6] The government contends, Opp. 11 n. 4, that the panel did not decide what level of compliance the Rule requires. But the opinion, with its reliance on a conclusion of "substantial compliance," contains a clear, albeit implied, holding that "substantial compliance" is sufficient to avoid reversal, a holding in conflict with that of several circuits.

[7] The court of appeals was able to rely on the general "finding" only by ignoring that the presentence report set forth the two contrary versions of various facts. That situation left it totally ambiguous which version of the facts the district court was adopting, when it accepted the "facts contained in the presentence report."

compliance" standard in upholding Rice's sentencing, not on the government's belated contention that each dispute was specifically addressed.[8] Pet. App. 10.

In sum, this case squarely poses two significant issues currently causing conflicts among the circuits, conflicts as to a provision invoked in nearly every criminal case. The government has attempted to recast the district court's action into specific findings on each dispute, as opposed to a general "finding," the legality of which is directly implicated by these conflicts. That attempt is belied by the panel opinion. It is belied as well by the government's concessions on appeal. Certiorari should be granted to resolve whether Rule 32(c)(3)(D) requires strict or only substantial compliance to avoid resentencing, including whether the Rule requires specific findings on each disputed matter.

DATED January 16, 1992.

ALAN ZARKY

---

[8] The government notes that the Ninth Circuit en banc has required strict compliance, as if that somehow militates against granting certiorari. Opp. 11, n. 4. If the matter were simply that of a panel failing to follow the law of its circuit, certiorari might be unwarranted. But where, as here, there is a sharp conflict among the circuits, with most circuits having addressed the issue, certiorari is not made less appropriate simply because the case presenting the issue involves an intra-circuit conflict as well. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457 (1967).

SUPPLEMENTAL APPENDIX A

Portions Of Pages 31-33 Of Defendant's Opening Brief On Appeal, CA No. 90-30125

[p. 31] In this case, the presentence report was replete with material which Rice and Rice Aircraft disputed. Among the factual assertions in the presentence report, which assertions were disputed but not addressed by the court's specific findings, were the following (with citation to the page of the presentence report and one "statement or other information" [often one of several places] where Rice disputed the assertion):

1) Whether the company, in replating according to QQ-P-416 rather than HS-322, was improperly replating. Report, p. 7; RT 21, 25, CR 14, pp. 37-38.

[p. 32] 2) Whether the company tested the replated parts. Report, p. 7; RT 21, 39.

3) Whether testing was required for all parts replated by Silverman-Shaw, or only the very few which were rated at over 180,000 pounds per square inch. Report, p. 7; RT 21, 39, CR 23, pp. 4-5.

4) Whether replating can only be performed by an approved source, or instead can be performed by anyone, so long as it is to specification. Report, p. 6; RT 28-29.

5) Whether aerospace customers, as a matter of policy, require traceable parts when ordering high-strength fasteners, or instead whether they sometimes request certifications but often do not. Report, p. 3; RT 36, 45.

6) Whether Bob Lambert was paid to see that the company was on Grumman's bid list more consistently

than its competitors, or instead simply not to interfere with Rice's business. Report, p. 4; CR 14, p. 94.

7) Similarly, whether Bob Lambert was paid to advise buyers not to obtain quotes from Peerless Aerospace. Report, p. 4; CR 14, p. 94.

9) [sic] Whether Votaw supplied Rice with mismatched test reports. Report, p. 4; CR 14, p. 82.

10) Whether Ken Boone provided the company with favorable pricing in exchange for payments. Report, p. 3; CR 10, p. 4 and CR 14, p. 101.

11) Whether Rice made payments to Richard Ohlman (and through him to John Rockwood) to obtain information which allowed the company to adjust a bid to Boeing's Surplus Division, or instead whether he made the payment, after his bid had been [p. 33] accepted, in response to an extortionate threat to hold up the shipment of parts. Report, p. 6; CR 14, p. 98.

12) Whether the parts with which Grumman experienced difficulties had been provided by the company. Report, p. 6; CR 51-54.

13) Whether the offense involved a fraud of between $200,000 and $1,000,000 or instead involved a total of $174,701 ($155,000 in payments, $12,500 in profits from replating and $7,201 from mismatched certifications) (Report, "Estimated Parole Guideline Worksheet; CR 15, ex. p. 2; CR 14, p. 59).

While the court did address some of the disputes Rice had with the presentence report, the court's findings did not resolve any of the disputes listed above.

* * *

SUPPLEMENTAL APPENDIX B

Portions Of Pages 17-21 Of Government's Brief On Appeal, CA No. 90-30134

[p. 17] 7. "Similarly, whether Bob Lambert was paid to advise buyers not to obtain quotes from Peerless Aerospace."

This asserted factual issue was, indeed, not directly addressed by the Court at sentencing, although he dealt thoroughly with the commercial bribes in the passages quoted in section 6, above. Given the Court's findings that the payments were made over a six year period for the purpose of gaining competitive advantage, one is at a loss as to how the Parole Commission might misuse the statement paraphrased in the underlined caption. Indeed, if defendant or his counsel saw a large significance in this statement, it was incumbent upon them to raise the issue with the Court, prior to or at the time of sentencing. The defendant is not entitled to a finding which is more specific than his general opposition to all facts which tend to aggravate the degree of his conduct.

8. Issue 8 was omitted from the Brief served upon the Government.

9. "Whether Votaw supplied Rice with mismatched test reports."

In his Admissions of Plea of Guilty, Rice admitted making secret payments to Votaw which amounted to more that [sic] $22,000 over a four year period (CR 10, p.6). The admitted reason was to obtain "more competitive pricing arrangements." Rice also [p. 18] admitted

paying Ohlman, Boone and Topp of Hi-Shear in order to obtain test reports, and then used those test reports to misrepresent that fasteners being sold were identified and rendered traceable by those reports, which in fact, did not match with the particular parts (CR 10, pp. 3-6).

The Court made the following findings as to the mismatched test reports:

> Mr. Rice has stated in open court, as well as his attorneys, that the company did not falsify reports. They merely took a different report for a different part and attached it to the part that was being sold to the customer. The Court fails to see any significant distinction between those two types of procedures. The delivery of a test report to a customer which the customer is obviously going to rely upon is a falsification. . . . "

(ST 86).

In light of the above findings, it is irrelevant whether the mismatched test reports came from Votaw or Ohlman, Boone and Topp. It is Rice, after all, who must answer for his conduct before the Parole Commission, not Votaw. If Rice or his attorneys see some significance in this statement vis-a-vis Rice, it was incumbent upon them to raise the issue specifically and timeously with the sentencing Court.

10. "Whether Ken Boone provided the company with favorable pricing in exchange for payments."

While Rice admitted making secret payments to Boone and receiving from him test reports, he would

contest the statement in the presentence report [p. 5] that Boone provided Rice with favorable pricing on parts.

[p. 19] Again, inasmuch as it is Rice and not Boone whose sentence is at issue, the relevance of this quibble is not apparent. Rice admitted, after all, making payments to Votaw to obtain "more competitive pricing arrangements" (CR 10, p. 6). But for a brief reference in the Defendants' Sentencing Memorandum [p. 101], the defendant never sought a ruling from the sentencing Court on this specific issue. Nevertheless, the Court did make the following finding with respect to this issue:

> Rice paid Hi-Shear employees Richard Ohlman and Ken Boone over $28,000. These payments Rice has admitted were to obtain manufacturer's test reports. . . .

(ST 90). This finding was consistent with defendants present position on this issue.

11. "Whether Rice made payments to Richard Ohlman . . . in response to an extortionate threat to hold up the shipment of parts."

While defendant does raise this issue at page 98 of his Sentencing Memorandum, he does so in relation to the Government's proffer – not as a contested issue in the presentence report. In connection with the sentencing, the defendant filed 160 pages of pleadings which, together with massive exhibits thereto, weighed some eight pounds. At the sentencing proceeding, he repeatedly declined to make specific objections to the presentence report. Consequently, he is not now in a position to

complain because the Court made a general ruling, finding the facts as set forth in the presentence report "subject to some additional findings I'm going to make during the course of my remarks."

[p. 20] The logical finding is that the Court simply found against the defendant on this issue, particularly in light of the Court's observation that the payments of $155,000 over the period of 1982 to August of 1987 "were made for the purpose of gaining a competitive advantage in the industry," (ST 91-2).

12. "Whether the parts with which Grumman experienced difficulties had been provided by the company."

Once again, defendant complains that the Court failed to make a specific finding as to a factual issue which he did not ask the Court to rule on. While Defendant did, at page 51 of his mammoth Memorandum (CR 14, p. 51-4) contend that Grumman may have confounded his bad parts with another's, at no time did he make the Court aware that he was contesting a statement in the presentence report, nor did he ask the Court to make a specific ruling on the issue. Indeed, when repeatedly asked to make specific objections, he simply failed to do so.

In making the following general finding:

> "I am therefore going to find as facts for purposes of sentencing the facts contained in the presentence report . . . ,"

the Court actually ruled on the Grumman issue. This is so because the Details of Offense section of the report relates that, when Grumman had some trouble with Rice parts, it was determined from Hi-Shear that the parts had been subjected to unauthorized and unacceptable modification. When confronted with the problem, Rice dissembled, stating falsely that the parts had come from Peerless.

In adopting these facts, the Court was amply supported by the evidence. The affidavit of Bernard Beal, a Grumman engineer [p. 21] (CR, Ex. D), established that parts which were causing problems with premature breaking off and locking, were traced to Rice. Special Agent Gordon Strand (CR 16, Ex. J) established that Rice fabricated internal records to falsely reflect that the problem parts had come from Peerless, when, in fact, Peerless did not provide such parts to Rice. The lengths to which Rice went to deceive Grumman as to the origin of the ersatz parts is described in the affidavit of Richard Kennedy, Manager of Quality Procured Material Supplier Control at Grumman (CR 19, Ex. A).

The finding being supported by ample evidence, is not subject to reversal under the clearly erroneous standard which defendant must sustain.

* * *